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No. 84-948

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CRAWFORD COUNTY, WISCONSIN,
Petitioner,

vs.

WESLEY N. HEIAR, KENNETH I. STRAUMAN and MYRL E. BROWN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a local government satisfy its burden of proving that age 55 is a bona fide occupational qualification (BFOQ) under 29 U.S.C. § 623(f)(1) when it establishes, among other things, that its law enforcement officers have similar duties to those of federal law enforcement officers who are also required to retire at age 55?

2. Under 29 U.S.C. § 623(f)(1) what is the appropriate standard of proof for determining whether a local government has established a bona fide occupational qualification at age 55 for law enforcement officers?

3. Where a state has adopted an age discrimination statute which, under 29 U.S.C. § 626(d)(2), extends the 180 day filing limitation to 300 days, is the 180 day limitation nevertheless applicable where, as here, the state law specifically excludes from coverage deputy sheriffs employed by County governments?

4. Where a defendant asserts a defense of the statute of limitations in its answer but does not press the defense in the trial court, is it an abuse of discretion for the appellate court to reject the defense where, as here, it involves purely a question of law and became relevant only because of specific findings of fact made by the trial court after the trial closed?

PARTIES

Petitioner, Crawford County, is a political subdivision of the State of Wisconsin.

Respondents Wesley N. Heiar, Kenneth I. Strauman and Myrl E. Brown are deputy sheriffs employed by the County.

Although the original complaint named many County officials as individual defendants, the case against all of them was dismissed by the trial court and no appeal was taken.

The county and the three respondents are the only remaining parties to this case.

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported. It is reproduced in Appendix B (App. 3-27).

The findings of fact and order for judgment of the district court were not officially reported. They are reproduced in Appendix C (App. 28-43). The transcript showing additional findings from the bench is reproduced in Appendix D (App.

44-65). The judgment of the district court is reproduced in Appendix E (App. 66). An amended judgment of the district court is reproduced in Appendix G (App. 71).

JURISDICTION

The decision of the Court of Appeals was entered on August 20, 1984. A petition for rehearing, which was timely filed, was denied on September 27, 1984. This petition is being filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The federal statutes involved are the Age Discrimination in Employment Act of 1967 (ADEA), as amended in 1978, 29 U.S.C. § 621 *et seq.*; 29 U.S.C. § 255 and 5 U.S.C. § 8335(b). Relevant portions of these statutes are printed as Appendix L (App. 81-84).

Relevant state statutes appear in Appendix L (App. 84-85).

STATEMENT

The petitioner, Crawford County, is one of the 71 counties in Wisconsin. It is located in the southwestern portion of the State on the Mississippi River and contains approximately 16,000 people. It is primarily a rural and agricultural county; the largest employer in the County employs approximately 300 employees.

The County Board of Supervisors is the elected legislative body. Its law enforcement committee exercises civilian control over the sheriff's department. All three respondents are employed as deputy sheriffs within that department.

State And Local Policy

The State of Wisconsin maintains a state-wide retirement system which includes special provisions for the retirement of persons occupying "protective" occupations. The statutory definition includes deputy sheriffs. Appendix L (App. 84-85). The County does not maintain a separate retirement system for its employees but is compelled by state statute to make contributions to the Wisconsin Retirement Fund on behalf of all its employees at rates specified by the state. On April 17, 1979, subsequent to a public hearing, the following resolution was adopted by the County Board:

> Now, therefore, be it resolved that is is the policy of Crawford County, Wisconsin that all non-elective protective occupation participants in the employ of said County cease employment for said County on the day on which said protective occupation participants of the Wisconsin Republic [sic] Employees Retirement Fund reaches the age of fifty-five (55) years.

On April 19, 1979 a written notice of this resolution was given to all County employees. The following day, on April 20, 1979, individual notice was given to respondents Heiar and Strauman that they would be compelled to retire as of June 30, 1979. None of the respondents filed charges with the appropriate state or federal agencies within 180 days protesting the implementation of this policy.

On June 30, 1979 respondents Heiar and Strauman were involuntarily retired from their positions as deputy sheriffs. Respondent Brown retired on September 9, 1979.[1]

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[1] Respondent Brown presents a slightly different fact situation because he walked off the job at midnight on his 55th birthday; he did file his charge within 180 days of that date.

In December 1979 all three respondents filed charges with the Wisconsin Department of Industry, Labor & Human Relations, Equal Rights Division, alleging that they had been compelled to retire at age 55 in violation of the state law. The Equal Rights Division responded as follows:

> ~~We~~ are unable to investigate your claim of discrimination against Crawford County Sheriff's Department because Wisconsin law does not cover age discrimination against any hazardous type of occupation such as law enforcement or firefighting.[2]

A handwritten note attached to the letter advised the respondents to contact the appropriate federal agency.

Shortly thereafter the respondents wrote to the EEOC. An investigation and conciliation effort was made by that agency. However, on March 18, 1982 all respondents were notified by letter that the EEOC's attempted resolution of the matter by informal conciliation, conference and persuasion had been unsuccessful and that it would take no further action in the case. A private suit by the respondents was commenced by filing a complaint in U.S. District Court on April 16, 1982, almost three years later.

The answer filed by the County admitted that the Respondents were retired solely because they had reached the mandatory retirement age. In addition, several affirmative defenses were asserted, including the running of the statute of limitations and that age 55 was a bona fide occupational qualification for law enforcement officers under state and federal law.

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[2] The Equal Rights Division was referring to the hazardous occupation exception to the state anti-discrimination law set forth in *Wis. Stat.* § 111.32(e) (1977-78) and reproduced in Appendix L (App. 85).

Findings Of The Trial Court

After a trial the district court found, *inter alia,* that:

Deputy sheriffs have a responsibility for public safety; are exposed to a high degree of danger or peril; and are required to maintain a level of physical conditioning greater than in other occupations. Because of these factors, the age for normal retirement of police and fire personnel is earlier than that for other employees (App. 34);

The medical evidence showed that some persons above the age of 55 are unable to effectively perform the duties of the job of law enforcement officers. That is, at least some employees over the age of 55 possess traits which disqualify them from the continuing performance of their duties (App. 34);

As human beings increase in age, the incidence of disability increases. Furthermore, claims of heart ailment increase with age for this classification of employee (App. 34);

Some duties performed by deputy sheriffs require quick and immediate reaction and response. These include traffic patrol at high rates of speed; immediate and sudden confrontation with persons stopped by patrol; local situations of a potentially serious and dangerous nature, i.e. robberies and burglaries in progress, dangerous fights and crowd demonstrations; and the patrolling of the river during emergencies (App. 34);

The duties performed by United States Deputy Marshals are similar in many respects to the duties performed by the deputy sheriffs in Crawford County (App. 36);

Some duties performed by FBI agents are similar to those performed by deputy sheriffs in Crawford County (App. 37);

Despite the foregoing findings and conclusions the trial court found that the performance of the duties of deputy sheriff of Crawford County in the classifications of patrolmen, sergeant of traffic and jail sergeant do not require that they be younger than age 55 (App. 50).

In finding a violation of the ADEA the district court concluded that the County had failed to show that "age is a bona fide occupational qualification by proving that one, all or substantially all deputy sheriffs over the age of 55 are unable to perform safely and effectively the duties of the job, or that it is impossible or impracticable to determine the job fitness on an individualized basis" (App. 56).

In addition, the district court rejected the County's claim that the suit was barred by the statute of limitations. It held that the time for filing a charge with the EEOC starts to run from the actual date of termination rather than the date that the employee first receives notice of the unfavorable employment decision (App. 52).

Decision Of The Court Of Appeals

The Court of Appeals affirmed the district court in all respects as to issues relating to the BFOQ. It also affirmed the district court on the statute of limitations issue pressed in the trial court but did so on different grounds.[3]

Judge Gibson filed a dissenting opinion.

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[3] The Court of Appeals, unlike the district court, recognized that the 180 day statute of limitations commenced running on the date of notification rather than the date of termination. It also extended the 180 day limitation to 300 days even though Wisconsin's fair employment statutes expressly exclude deputy sheriffs from coverage and authorize the County to retire these officers at age 55. *Wis. Stat.* § 41.02(23) (1977-78). Finally, the Court of Appeals agreed that the two year statute of limitations was applicable but rejected that defense because it was not pressed in the trial court.

REASONS FOR GRANTING THE WRIT

1. There Is A Direct Conflict Between The United States Circuit Courts Of Appeal As To The Weight To Be Given Federal Mandatory Retirement Provisions In Evaluating A Non-Federal Employer's BFOQ Defense.

The court below was divided on the County's argument that age 55 is a bona fide occupational qualification (BFOQ) for the job of deputy sheriff in Crawford County as presumptively evidenced by Congress' adoption under 5 U.S.C. § 8335(b) of the identical retirement age for federal law enforcement personnel. Notwithstanding the County's evidence and the district court's findings that the duties of the deputy sheriff were similar to those of federal law enforcement officers, the Seventh Circuit, in its majority opinion, concluded that the legislative histories of the ADEA and of § 8335(b) did not require the harmonization of these inconsistently applied legislative policies (App. 14-16).

This holding conflicts with the decision of the Court of Appeals for the Fourth Circuit in *Johnson v. Mayor & City of Baltimore,* 731 F.2d 209 (4th Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3291 (U.S. Sept. 27, 1984) (No. 84-518) and 53 U.S.L.W. 3405 (U.S., Nov. 2, 1984) (No. 84-710). *Johnson* is factually similar to the case before the Court. In that case, the Fourth Circuit held that the City of Baltimore was justified in applying to its firefighters the same age of retirement that the federal government applies to its own employees doing similar work. The court held that the City was entitled to the BFOQ defense as a matter of law because of the Congressional determination, as evidenced by 5 U.S.C. § 8335(b), that age is a BFOQ for federal firefighters. 731 F.2d at 212-13.

In *EEOC v. Wyoming,* 460 U.S. 226 (1983) this Court held that the ADEA could constitutionally be applied to the states. Although both the majority and dissenting opinions briefly commented on the question of whether 5 U.S.C. § 8335(b) ap-

plies to state protective service employees, the Court declined to rule on that issue. *Wyoming,* 460 U.S. at 242-43 n.17 (Brennan, J.), 259-60 (Burger, C.J., dissenting). The majority opinion of the Court emphasized:

> Perhaps more important, appellees remain free under the ADEA to continue to do *precisely what they are doing now,* if they can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden. See *supra,* at 5. Thus in distinct contrast to the situation in *National League of Cities, supra* at 848, even the state's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard.

460 U.S. at 240 (emphasis in original).

What is the "reasonable federal standard" to which the opinion refers? The Fourth Circuit concluded it is the standard which the federal government has adopted for its own employees working in the same job classifications—age 55, as set forth in 5 U.S.C. § 8335(b). *Johnson,* 731 F.2d at 212.

The court below, however, rejected this same argument, and in direct conflict with the holding in *Johnson* held that age 55 is not a BFOQ for local law enforcement officers although the same age was selected by the federal government. (App. 14) citing *Orzel v. City of Wauwatosa,* 697 F.2d 743, 749-50 (7th Cir.), *cert. denied,* ____ U.S. ____, 78 L.Ed.2d 680 (1983). The Seventh Circuit has reached this conclusion notwithstanding the fact that the same session of Congress adopted both the amendments to the ADEA and 5 U.S.C. § 8335(b). *See Orzel,* 697 F.2d at 749.

In addition, the Court of Appeals for the Eighth Circuit recently relied on this same federal law in holding that age 60 is a BFOQ for state law enforcement officers in Missouri. *EEOC v. Missouri State Highway Patrol,* ____ F.2d ____, (8th Cir. Nov. 12, 1984).

The Courts of Appeal for the Fourth, Seventh and Eighth Circuits have arrived at completely divergent decisions on this question. Since the age selected by the state for the retirement of its employees has been preempted, and since the federal circuit courts of appeal are in disagreement whether age 55 is appropriate under federal law, there is no bright line to guide local decisionmakers. This conflict between the Fourth and Seventh Circuits is irreconcilable and requires resolution by this Court.

2. Because There Is A Conflict Between The Circuits On The Burden Of Proof Necessary To Establish A Specific Age As A Bona Fide Occupational Qualification For Employees Working In Jobs That Affect Public Safety, This Court Should Resolve The Conflict.

The U.S. Courts of Appeal have been struggling with considerable uncertainty on the problem of how to apply the BFOQ exception in occupations affecting public safety. There is a noticeable lack of uniformity in the application of the proper burden of proof which public and private employers must meet in defending their established age restrictions in their hiring and retirement policies for persons working in such occupations. A uniform standard is essential since public and private employers responsible for public safety must establish and support these restrictions. Although to date this Court has not passed on this pivotal issue it has granted a petition for certiorari in a case involving airline flight officers of a private corporation. *Western Airlines v. Criswell,* 709 F.2d 544 (9th Cir. 1983), *cert. granted,* 53 U.S.L.W. 3235 (U.S. Oct. 1, 1984) (No. 83-1545).[4]

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[4] One issue accepted for review by this Court in *Western Airlines* is relevant to the instant case: Where an airline, pursuant to federally recognized responsibility to operate with the highest possible degree of safety in the public interest, imposes an age 60 BFOQ upon Second Officers (flight engineers), what standards govern the review of that BFOQ by a trial jury evaluating ADEA § 4(f)(1) defense?

Although *Criswell* involved a private employer (airline), the decisions of the Courts of Appeal conflict in the articulation and application of the burden of proof required for establishing a BFOQ defense for all employers in occupations affecting safety. For example:

A. In the case at bar, the district court and the court below concluded that the County had not met its burden of proving that age 55 is a BFOQ for duputy sheriffs because it did not meet the burden of proof established by the Seventh Circuit in *Orzel v. City of Wauwatosa,* 697 F.2d 743 (7th Cir.), *cert. denied,* ____ U.S. ____, 78 L.Ed.2d 680 (1983). In *Orzel* the court approved the two-prong test set out in the EEOC Regulations at 29 C.F.R. §1625.6(b)[5] 697 F.2d at 754.

The EEOC's standard was originally introduced in *Usery v. Tamiami Trail Tours, Inc.,* 531 F.2d 224 (5th Cir. 1976). *Tamiami* approved an employer's maximum hiring age of 40 for inter-city bus drivers as a BFOQ.[6]

The Seventh Circuit, in an earlier case, specifically rejected the test now being applied by the EEOC. See *Hodgson v. Greyhound Lines, Inc.,* 499 F.2d 859, 861-62 (7th Cir. 1974), *cert. denied,* 419 U.S. 1122 (1975). Instead the court in *Greyhound* held that a public safety employer need only have a "rational basis in fact" to believe that the age limitation was correct. 499 F.2d at 863.

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[5] The EEOC Regulations at 29 C.F.R. §1625.6(b) are reproduced in Appendix M.

[6] The standard formulated in *Tamiami* is derived from two prior Fifth Circuit cases. *Diaz v. Pan American World Airlines, Inc.,* 442 F.2d 385 (5th Cir. 1971), *cert. denied,* 404 U.S. 950 (1971) and *Weeks v. Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228 (5th Cir. 1969). These cases involved the establishment of a BFOQ defense in sex discrimination actions under the 1964 Civil Rights Act, not under the ADEA.

However, in the instant case, as in *Orzel,* the Seventh Circuit has changed its position and now follows the EEOC/*Tamiami* standard. Nevertheless, despite this apparent abandonment of the "rational basis in fact" test by the Seventh Circuit, other circuit courts of appeal have continued to rely on the *Greyhound* standard. *See, e.g., Murnane v. American Airlines, Inc.* 667 F.2d 98 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 915 (1982).

In *Murnane,* the Court upheld the employer's hiring policy, including a maximum hiring age limit of 40 as a BFOQ, because it "might result in the death of one less person than were American required to abandon or modify these policies." 667 F.2d at 101, citing *Greyhound,* 499 F.2d at 863.

B. Some Circuit courts have given substantial weight to the existence of federal statutes and regulations as evidence to establish a specific age as a BFOQ. *Starr v. F.A.A.,* 589 F.2d 307 (7th Cir. 1978) (approving the compulsory retirement of commercial pilots at age 60 pursuant to an F.A.A. rule). *See also Hoefelman v. Conservation Commission of Missouri,* 718 F.2d 281 (8th Cir. 1983); Gathercole v. Global Associates, 727 F.2d 1485 (9th Cir. 1984); *Johnson v. Mayor & City of Baltimore,* 731 F.2d 209 (4th Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3291 (U.S. Sept. 27, 1984) (No. 84-518) and ____ U.S.L.W. ____ (U.S. ____, 1984) (No. 84-710).

Other courts, however, have been unwilling to give the same weight to the existence of federal law when considering the burden of proof issue. *Tuohy v. Ford Motor Co.,* 675 F.2d 842 (6th Cir. 1982) (where the court refused to apply the same F.A.A. rule to pilots employed to fly executives of a private company in the absence of a separate evidentiary showing that "medical science cannot predict, on an individual basis, the likelihood that a pilot who has reached age 60 will become incapacitated during flight.") 675 F.2d at 846.

C. The Courts of Appeal for the Fifth Circuit and District of Columbia Circuit have expressly encouraged the trial courts to accord deference to the business judgment of an employer having a public safety responsibility. *See Tamiami,* 531 F.2d at 236 n.30; *Murnane,* 667 F.2d at 101. The Seventh Circuit did not give this same deference to the decision made by the public employers involved in the case at bar or in *Orzel,* 697 F.2d at 750-52.[7]

D. Some circuits, while specifically adopting the two-pronged test of the EEOC, have affirmed trial court findings that a BFOQ has been established where the employer proved it had "reasonable cause, that is, a factual basis for believing" the truth of these elements. *See, e.g., EEOC v. University of Texas Health Science Center,* 710 F.2d 1091, 1093 (5th cir. 1983); *Arritt v. Grisell,* 567 F.2d 1267, 1271 (4th Cir. 1977). The Sixth Circuit has also stated that in cases involving the presence of an overriding safety factor, the level of proof required to establish a BFOQ is "relatively low". *See Tuohy,* 675 F.2d at 845. See also *EEOC v. County of Santa Barbara,* 666 F.2d 373, 377 (9th Cir. 1982).

In other cases the Ninth Circuit failed to similarly recognize this "safety factor". *EEOC v. County of Los Angeles,* 706 F.2d 1039 (9th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 984 (1984); *Western Airlines v. Criswell,* 709 F.2d 544 (9th Cir. 1983), *cert. granted,* 53 U.S.L.W. 3235 (U.S. Oct. 1, 1984) (No. 83-1545).

As these cases indicate, the circuit courts are in direct conflict as to whether an employer whose operations affect public safety must meet the higher EEOC standard of proof which requires

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[7] At one point the Seventh Circuit held that a mandatory retirement age of 55 adopted by the Wisconsin state legislature was entitled to a "presumption of validity" when the BFOQ defense was asserted. *EEOC v. City of Janesville,* 630 F.2d 1254, 1259 (7th Cir. 1980).

proof of the absolute truth of the BFOQ elements or must meet the lower "rational basis in fact" test.[8]

In the case at bar, the county's evidence showed, that: (a) age does affect continued ability to perform law enforcement duties; (b) age 55 is the identical age selected by the federal government for its own employees working in the same job classification; (c) the state retirement system in which the County participates authorizes compulsory retirement at age 55; (d) the municipal ordinances compel such retirement; and (e) studies by the state government over a twenty (20) year period show that age 55 is the appropriate age for retirement of these classifications of employees whose continued employment can affect public safety and health.

This evidence was held to be insufficient to meet the higher burden of proof required by the Seventh Circuit of all employers seeking to establish a BFOQ. Had a more appropriate burden of proof been applied by the district court to the evidence produced at trial, a different conclusion would have been reached.

In view of the current inconsistency in the decisions of the circuit courts of appeal as to the appropriate burden of proof to be applied, this case presents the Court with an opportunity to resolve this important issue.

3. This Case Presents Important Federal Issues Involving The Construction And Application Of The Statutes of Limitations Under The ADEA Which Should Be Resolved By This Court.

A. The 180-Day Statute.

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[8] The "rational basis in fact" standard is applied by the federal courts in cases of this kind involving the retirement of federal employees. *Bowman v. U.S. Department of Justice,* 510 F.Supp. 1183 (E.D. Va., 1981), *aff'd,* 679 F.2d 876 (4th Cir.) *cert. denied,* 459 U.S. 1072 (1982). This standard was flatly rejected as not applicable to state or local governments in *Orzel v. Wauwatosa,* 697 F.2d at 749.

To bring an action under the ADEA a plaintiff must observe two time requirements: (1) a charge must be filed with the EEOC within 180 days of the unfavorable employment decision; and (2) the suit must be filed no earlier than 60 days after filing the charge and no later than two years after the unfavorable employment decision; three years in the case of a "willful" violation. 29 U.S.C. § 626(d)(1) and (e); 29 U.S.C. § 255(a); *Chardon v. Fernandez,* 454 U.S. 6 (1981) (per curiam). The time limit for filing the charge is extended from 180 to 300 days in "deferral" states, i.e., those states that have a statute prohibiting age discrimination and a state agency authorized to grant relief. 29 U.S.C. §§ 626(d)(2) and 633(b); *Simpson v. Whirlpool Corp.,* 604 F.2d 997, 999 (6th Cir. 1979).

Although Wisconsin has a statute which prohibits age discrimination and also an agency with authority to remedy violations, the state statute, by its express terms, does not apply to law enforcement officers. The Wisconsin statute applicable at the time of this lawsuit provided:

> The prohibition against discrimination because of age shall not apply to hazardous occupations including, without limitation because of enumeration, law enforcement or firefighting.

Wis. Stat. § 111.32(e) (1977-78).

Although the plaintiffs did not file their charge within 180 days of being notified of their compulsory retirement, the district court rejected this defense as a basis for barring the claim. It held that because the date of actual separation from employment triggers the statute, the 180-day limitation period did not apply in this case.

The Court of Appeals affirmed this result, although on different grounds.[9] Despite the existence of the state statute ex-

[9] The court below properly held, as specified by *Delaware State College v. Ricks,* 449 U.S. 250, 258 (1980) and *Chardon v. Fernandez,* 454 U.S. 6, 8 (1981) (per curiam) that the date of notification of termination, not the date of actual separation, triggered the 180-day statute of limitations.

cluding law enforcement personnel from the purview of the state anti-discrimination laws, the court held that the 300, not the 180-day, limitation period applied. It determined that it would be inequitable to expect the claimants to know that their job classification was excluded from coverage by the state law prohibiting discrimination because of age (App. 7-8).

The Petitioner submits that since Wisconsin excludes deputy sheriffs from coverage under its age discrimination statutes the charge of discrimination must be filed within 180 days of the unfavorable employment decision or it is time barred.

B. The Two-Year Statute.

The answer filed by the County included the defense that the claim was barred by the statute of limitations, without specifying the code numbers of the statutes involved. The County pressed the argument in the trial court that the 180-day limitation period applied and reproduced a copy of 29 U.S.C. § 626(d) in its pretrial brief. No specific mention was made in the pretrial brief of the two-year statute of limitations set out under 29 U.S.C. §§ 255, 626(e). No post trial briefs were filed. Although a pretrial order was entered it did not delineate any of the issues for trial. However, the plaintiffs, seeking to avoid the statute of limitations and to secure statutory liquidated damages, alleged that the violation was "willful". Under 29 U.S.C. § 255(a), complaints alleging willful violations must be filed within three years. There was no dispute in this case that the plaintiffs' suit was filed within the requisite three year period if that statute was applicable. The willfulness issue was fully tried and the trial court specifically found that the violation was not willful (App. 58). Based on this factual finding, the County then pressed the two-year statute of limitations on appeal.

The court below affirmed the finding that there was no willful violation of the Act (App. 17-18) but held that the defense of the two-year statute of limitations was waived by the County's

failure to press that issue in the trial court (App. 9-10). That holding conflicts with a decision of the Sixth Circuit where the court itself, on oral argument, raised and requested additional briefing on a statute of limitations issue not raised by either party. *Val Decker Packing Co. v. Corn Products Sales Co.*, 411 F.2d 850 (6th Cir. 1969). There, the court stated that it has "the right to consider all of the statutes [of limitation applicable] and to apply the one which in our judgment is required under [state] law." 411 F.2d at 842.

In addition, the court below distinguished a decision of the Ninth Circuit in *Donovan v. Crisostomo*, 689 F.2d 869 (9th Cir. 1982) which is flatly to the contrary. The petitioner submits, however, that the distinctions the court drew are not applicable, most particularly because it ignored the basic fact that it was the trial court's findings on a critical and contested issue of fact (whether the alleged violation was willful) that for the first time made the two-year statute of limitations clearly applicable. That critical factual finding made the application of the statute a pure issue of law which should have been applied by the Court.

Generally, the statute of limitations is waived if it is not asserted in the pleadings. *Orzel v. City of Wauwatosa*, 697 F.2d 743, 747 n.8 (7th Cir.), *cert. denied*, ____ U.S. ____, 78 L.Ed.2d 680 (1983). The defense may be raised by its bare assertion and need not be identified by specific code number. *Santos v. District Council of New York City*, 619 F.2d 963, 967 (2d Cir. 1980). Even identifying the statute of limitations by the erroneous code number does not waive the statute. *Reconstruction Finance Corp. v. Tuolumne Gold Dredging Corp.*, 137 F.Supp. 855, 862 (N.D. Cal. 1953), *aff'd*, 230 F.2d 479 (9th Cir.), *cert. denied*, 352 U.S. 832 (1956). Furthermore, raising the statute of limitations on appeal for the first time has been permitted where the defendant seeks no novel interpretation of the statute, the facts relative to the application of the statute are not in dispute, and the defendant seeks to apply the statute as a pure point of law. *Crisostomo*, 689 F.2d at 874.

However, the petitioner never clearly and unequivocally waived the statute of limitations, nor was that defense ever stricken from the pleadings by pre-trial order or otherwise. It was first raised on appeal because the findings of the trial court made it clearly applicable only then. Finally, if evidence did exist that would have justified tolling the limitation period, the court should have remanded the case to permit its introduction. *See Adato v. Kagan,* 599 F.2d 1111, 1116 (2d Cir. 1979). But to hold the defense "waived", in the circumstances presented here, was not required by any legal precedent and worked a substantial injustice to the County and its taxpayers. *See Donovan v. Crisostomo,* 689 F.2d 869 (9th Cir. 1982). *See also Santos v. District Council of New York City,* 619 F.2d 963 (2d Cir. 1980); *Vintero Corp. v. Corporacion Venezolana De Fomento,* 675 F.2d 513 (2d Cir. 1982).

Whether it is proper to consider issues for the first time on appeal is a question left primarily to the discretion of the appellate courts. *See Singleton v. Wulff,* 428 U.S. 106 (1976). However, the denial of the statute of limitations defense, under the circumstances presented in the case at bar, where the Court acknowledged the validity of the defense, is an abuse of the Court's discretion. This Court should accept this case so as to remedy this incorrect result and to establish guidelines for the circuit courts for permitting relevant issues of law to be raised on appeal where the findings of the trial court make the issues for the first time clearly applicable.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari be granted because this case presents the following justiciable federal issues:

1. A direct conflict between the circuits exists concerning the weight to be given federal mandatory retirement statutes in evaluating a non-federal employer's "bona fide occupational qualification" defense.

2. A direct conflict concerning the standard of proof is to be applied under federal law when an employer asserts that age is a bona fide occupational qualification and the job involved affects public safety.

3. The construction and accomodation of federal and state statutes of limitation in asserting rights under the ADEA.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

September 27, 1984

Before

Hon. Richard A. Posner, Circuit Judge

Hon. John L. Coffey, Circuit Judge

Hon. Floyd R. Gibson, Senior Circuit Judge*

Nos. 83-1872, 83-2149
83-2166, 83-3139

WESLEY N. HEIAR, KENNETH I. STRAUMAN, and MYRL E. BROWN,

Plaintiffs-Appellees, Cross-Appellants,

vs.

CRAWFORD COUNTY, WISCONSIN,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Western District of Wisconsin.

No. 82-C 273

John C. Shabaz, *Judge.*

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* Hon. Floyd R. Gibson of the Eighth Circuit, sitting by designation.

ORDER

On September 4, 1984, defendant-appellant, Crawford County, Wisconsin, filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-1872, 83-2149, 83-2166, 83-3139

Wesley N. Heiar, Kenneth I. Strauman,
and Myrl E. Brown,
Plaintiffs-Appellees, Cross-Appellants,

v.

Crawford County, Wisconsin,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Western District of Wisconsin.
No. 82- C 273—John C. Shabaz, *Judge.*

Argued April 5, 1984—Decided August 20, 1984

Before Posner and Coffey, *Circuit Judges,* and Gibson, *Senior Circuit Judge.* *

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* *Hon. Floyd R. Gibson of the Eighth Circuit, sitting by designation.*

Posner, *Circuit Judge.* Three deputy sheriffs (policemen) of Crawford County, Wisconsin brought suit against the County charging that its mandatory retirement age of 55 for policemen violated the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 *et seq.* After a bench trial, the district judge gave judgment for the plaintiffs on their age discrimination claim (while dismissing their other claims and the other defendants), ordered the plaintiffs reinstated with back pay of $115,000 (after subtracting the other wages they had earned in this period, unemmployment compensation they had received, and the extra retirement benefits they had gotten by being forced to retire at age 55), and awarded them attorney's fees of $29,000. The County has appealed, raising some novel questions, chiefly about the Act's two statutes of limitations; and the plaintiffs have cross-appealed, arguing that they should have received double damages because the defendants' violation of the Act was willful, that they are entitled to prejudgment interest on the back-pay awards, and that the award of attorney's fees was too small. Some of these arguments, too, raise difficult questions.

The County makes two significant challenges to the finding that it violated the Act: it argues that the suit is barred by either or both of the Act's statutes of limitations (unless both are satisfied, suit is barred), and that being under 55 is a bona fide occupational qualification for a Crawford County police officer. A third argument, that the Eleventh Amendment immunizes counties from having to pay federal money judgments, has no possible merit after *Mackey v. Stanton,* 586 F.2d 1126, 1130-31 (7th Cir. 1978). The purpose of the Eleventh Amendment is to shield state treasuries from federal court judgments, and the financial interdependence between state and county government is not great enough to make the County an arm of the state for purposes of applying the Eleventh Amendment. Although *Mackey* dealt with counties in Indiana, not Wisconsin, Wisconsin counties appear to have a similar relationship to their state government. See Wis. Stat. § 59.01(1). And all this

told then what the terms of his employment are, that is the day on which he receives "notice" that he will be unlawfully terminated. And maybe, on this view, if the employee learned of those terms before he signed on, the statute of limitations would begin to run *before* he began to work. Such arguments, if accepted, would unduly constrict employees' ability to enforce their rights under the Act. People do not want to begin their employment by suing their employer over a mandatory retirement age that is 30 years in the future for them; and in those few cases that were brought, the courts would be deciding disputes prematurely. And yet the argument is a plausible corollary to the idea that notice sets the statute of limitations running. But no court has pressed the logic of the notice approach so relentlessly, or is likely to do so; and we merely want to emphasize that, merely because a specific notice of termination, such as the plaintiffs in this case received, starts the 180-day statute of limitations running, it does not follow that the notice an employee receives when he is first hired would also set the statute to run; it surely would not.

Although two of the plaintiffs did receive specific notice of their impending termination more than 180 days before they filed their charges, they did file within 300 days, which was in time if Wisconsin is a "deferral" state, 29 U.S.C. § 626(d)(2), defined as "a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice," 29 U.S.C. § 633(b). Wisconsin does have an age discrimination law, Wis. Stat. §§ 111.31 *et seq.*, and an agency empowered to enforce it, see Wis. Stat. §§ 111.36 (now §§ 111.375, 111.39). The problem is that the law as it read when the plaintiffs were forced to retire provided: "The prohibition against discrimination because of age shall not apply to hazardous occupations including, without limitation because of enumeration, law enforcement or fire fighting." Wis. Stat. § 111.32(5)(e). This certainly appears to exempt the County, especially when the wording of the statute is compared to that

of its successor (not involved in this case), which exempts "employment in which the employe is exposed to physical danger or hazard, including, without limitation because of enumeration, *certain* employment in law enforcement or fire fighting." Wis. Stat. § 111.33(2)(f) (emphasis added). Since the reason for giving plaintiffs extra time to sue in deferral states is that the federal act requires anyone complaining about age discrimination in such states to begin state administrative proceedings as a precondition to bringing a federal suit, see 29 U.S.C. § 633(b); *Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 753 (1979), and since initiating such a proceeding would have been an act of utter futility here, the County has an argument that the 300-day limitation period does not apply.

But not a compelling argument. The bar of the statute of limitations ought not depend on something so uncertain as whether a particular type of age discrimination is within or without the state's age discrimination law; it should be enough that there is a law at least potentially applicable to the employer (as was not the cae in *Keitz v. Lever Bros. Co.,* 563 F. Supp. 230, 234 (N.D. Ind. 1983)), and an agency charged with enforcing it (as was not the case in *Eklund v. Lubrizol Corp.,* 529 F.2d 247, 249 (6th Cir. 1976)). Otherwise, just to know how much time he had in which to bring a federal suit, a potential plaintiff would have to conduct research, sometimes in great depth, on the state law. True, a potential plaintiff may have to do some research just to know whether he is in a state that has an age discrimination law and an agency with enforcement powers, though state law may—Wisconsin law does, see Wis. Adm. Code § Ind. 88.21—require employers to notify employees of their rights under the state's age discrimination law. But under the view pressed by the County the cautious plaintiff in any state would feel he had to file within 180 days, since he could not be positive whether his claim would come within the scope of his state's law and a mistake wuld be disastrous. The 300-day provision would be read out of the statute.

Moreover, the purpose of giving a state that has an age discrimination law a chance to respond to any age discrimination claim is to encourage the states to eliminate age discrimination without federal judicial intervention, and is served even in cases such as this where it is pretty clear that the state agency cannot help the claimant. The filing of a claim may alert the agency to an unintended gap or ambiguity in the law. This may lead the agency to propose an amendment to the law, or may lead a state court (not necessarily in the same case) to eliminate the gap or ambiguity by interpretation. The exclusion of law enforcement officers from Wisconsin's age discrimination law, even as the law read at the time of the plaintiffs' termination, was not entirely free from ambiguity; a state court might have decided that only hazardous law enforcement jobs were intended to be excluded and might have gone on to find that these plaintiffs' jobs were not hazardous. This opportunity would be denied the state if the defendants' argument prevailed. For that argument implies not merely that the plaintiffs had only 180 days within which to file their charges with the EEOC but also that they had no obligation to complain to the state—an obligation that exists only in deferral states. See 29 U.S.C. § 633(b).

The second statute of limitations applicable to this case, 29 U.S.C. § 255 (a part of the Portal-to-Portal Pay Act of 1947 incorporated in the Age Discrimination in Employment Act by 29 U.S.C. § 626(e)(1)), provides that every action "shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." The district court found that the County's violation was not willful; and although the plaintiffs have challenged this finding in their cross-appeal, we think it was right (as shall appear). So the two-year rather than the three-year statute of limitations is applicable (along with the 300-day statute), and it was exceeded. We reject the plaintiffs' argument that the two-year statute was tolled by section 626(e)(2), which provides: "For the period during which the

[EEOC] is attempting to effect voluntary compliance with the requirements of this chapter . . . pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year." The conciliation referred to—conciliation under section 626(b)—is that preceding suits by the EEOC. Conciliation in private actions is provided for separately in section 626(d). We do not attribute omniscience to legislative draftsmen; but it is hardly likely taht in referring in section 626(e)(2) to conciliation only under subsection (b) they simply overlooked subsection (d), which is just a few brief sentences before (e)(2). The conference report dispels any doubt by stating with admirable directness that the tolling provision in 626(e))2) "does not apply to conciliation required by section [626](d)." H. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13 (1978). See also *Leite v. Kennecott Copper Corp., supra,* 558 F. lSupp. at 1173 n. 1, and references there. The point is not that there are different forms of conciliation; it is that only the EEOC can use the period of conciliation to toll the statute of limitations. The private plaintiff is bound to the statutory period. Although as an original matter one might criticize this result as discouraging the settlement of age discrimination claims, the language and history of the statute leave no room for the interpretation that the plaintiffs suggest.

But although the County may well have had a good defense at one time based on the two-year statute of limitations, it forfeited the defense in the district court and cannot revive it here. The answer to the complaint did plead statute of limitations as an affirmative defense, and though it did not indicate which statute or statutes of limitations barred the plaintiffs' suit (all the answer said on the point was, "As and for a third affirmative defense the defendants allege that the complaint is barred by the statute of limitations"), that particular omission was not critical. See, e.g., *Santos v. District Council,* 619 F.2d 963, 967 (2d Cir. 1980). The notice-pleading philosophy of the Federal Rules of Civil Procedure excuses lack of particularity at the pleading stage, with the exceptions listed in Rule 9, none of

which is applicable to this case. But what is critical is that, as the case progressed, the County and the other defendants (who have since been dismissed out, as we have said) never mentioned the two-year statute of limitations, though they mentioned the 180/300-day period frequently. It is not referred to in the pretrial order, which "shall control the subsequent course of the action unless modified by a subsequent order." Fed. R. Civ. P. 16(e). (And the order was not modified in the County's brief in this court.

That was too late. An appellant in a civil case cannot raise a ground for reversal for the first time on appeal unless ti goes to the district court's subject-matter jurisdiction; and though there are exceptions to this as to virtually every legal rule, none of them is applicable here. See, e.g., *Capitol Indemnity Corp. v. Keller*, 717 F.2d 324, 329 (7th Cir. 1983). It makes no difference if the ground is one abandoned in the district court rather than never raised there. See *Oberlin v. Marlin American Corp.*, 596 F.2d 1322, 1325 n. 1 (7th Cir. 1979). And a ground raised but not "pressed" in the district court is abandoned. See, e.g., *King v. Stevenson*, 445 F.2d 565, 571 (7th Cir. 1971); *Stanspec Corp. v. Jelco, Inc.*, 464 F.2d 1184, 1187 (10th Cir. 1972). Even a ground "not clearly presented" to the district court will be treated as abandoned, at least in the absence of plain error. See *Nathan Rodgers Construction & Realty Corp. v. City of Saraland*, 676 F.2d 162, 163 (5th Cir. 1982). And there can be no showing of plain error here; for, as we shall see, the plaintiffs were denied an opportunity to show that the statute of limitations was tolled by the defendants' conduct.

Donovan v. Crisostomo, 689 F.2d 869, 874 (9th Cir. 1982), a rare case where the defendants were allowed to raise the bar of the statute of limitations on appeal, illustrates the limits of legal generalization but is distinguishable from the present case on three grounds. (Another such case, even more clearly distinguishable, is *Val Decker Packing Co. v. Corn Products Sales Co.*, 411 F.2d 850, 851-52 (6th Cir. 1969).) There was only

one applicable statute of limitations in *Donovan*, so there could be no doubt that is was the statute that the defendants had tried to raise in the district court by pleading statute of limitations as a defense; the statute had been mentioned in the pretrial order; and there were no unresolved factual issues to prevent a definitive resolution at the appellate level. Here the two-year statute of limitations was mentioned, if at all, for the last time before appeal in the answer to the complaint (and maybe not even then, as the reference may have been to the 180/300-day statute). More important, had the plaintiffs known that this statute of limitations was in play they might have presented evidence in the district court to show that the defendants had tolled it, as in *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979), by conduct distinct from the conciliation efforts of the EEOC, which as we have said could not toll it.

We conclude that the case is not time-barred and more on to the question whether Crawford County's mandatory retirement age is within the Act's exception for cases "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business...." 29 U.S.C. § 623(f)(1). Although there is no question that the duties of a Crawford County deputy sheriff—a police officer in a rural county—at times require a quick, strenuous, physical response in hazardous conditions, or that the capacity for such responses diminishes with age, an inverse correlation between age and job fitness is not enough to carry the employer's burden of proving that youth is a bona fide occupational qualification. This court, laying stress on the statutory words "reasonably necessary," held in *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 752 (7th Cir. 1983) (a case that involved the application of a mandatory retirement age of 55 to an assistant fire chief), that it was not enough for the employer "to show that it made a 'good faith judgment concerning the safety needs' of its citizens," and the court therefore rejected the argument that the employer's "mandatory retirement policy should be upheld as long as that policy is 'not the result of an arbitrary belief lacking in objective

reason or rationale'. . . ." If a good-faith judgment, based on a loose fit between the needs of the job and the effects of age, were enough to bring a mandatory retirement policy within the shelter of section 623(f)(1), the Act would have little bite. Older people in our society are not a despised and powerless minority; and mandatory retirement laws, rather than being manifestations of vicious, exploitive, or unreasoning prejudice, are for the most part efforts—crude and arbitrary perhaps but not malicious—to balance the costs of a fixed retirement age in sometimes forcing our perfectly fit employees with the benefits in avoiding individualized evaluations of fitness, evaluations both costly for the employer to make and potentially humiliating for the individual employee to receive. To exempt from the Act mandatory retirement policies just because they were adopted in good faith and struck a reasonable balance between the relevant costs and benefits would therefore deprive the Act of much of its intended effect in helping older people retain their jobs longer. The language of the statute commanding that any mandatory retirement law under 70 be not only reasonable but reasonably necessary, is against such an interpretation, and *Orzel* rejected it. *Orzel* requires that the employer put in persuasive evidence that it needed to impose a mandatory retirement age on its employees (see 67 F.2d at 754; see also *Monroe v. United Air Lines,* Nos. 83-1245 et al. slip op. at 11 (7th Cir. May 30, 1984); *EEOC v. County of Los Angeles,* 706 F.2d 1039, 1042 (9th Cir. 1983)), as the employer did for example in *Mahoney v. Trabucco,* No. 83-1862, slip op. at 4 (1st Cir. July 2, 1984), where the First Circuit recently upheld mandatory retirement at 50 for uniformed state police in Massachusetts.

Therefore Crawford County cannot succeed merely by showing that this or other courts have on different evidentiary records upheld mandatory retirement ages 55 or even less for jobs involving public safety. The unfortunate fact for the County is that the evidence that it put in was weak and that the district judge, whose finding that the age-55 rule was not reasonably necessary we review of course under the deferential

"clearly erroneous" standard, was not persuaded by it. The County's case rested very largely on the testimony of two witnesses. The first, a cardiologist, testified to what is anyway obvious, that the incidence of heart disease and other ailments that can affect one's ability to respond effectively in the type of emergency situations that sometimes confront police officers rises with age. On cross-examination he acknowledged that he was not familiar with the duties of a Crawford County deputy sheriff. The second witness, an exercise physiologist, testified that it would take at least a year to develop tests that the Crawford County sheriff's office could use to determine individual fitness. But on cross-examination he acknowledged that such tests already existed. These witness' testimony was not much evidence that mandatory retirement at age 55 is "reasonably necessary" for the normal operation of the Crawford County sheriff's department—certainly not such evidence as could warrant our overturning the district judge's finding.

Moreover, a telling bit of evidence that mandatory retirement at age 55 is not "reasonably necessary" is that the Crawford County sheriff's department does not require deputy sheriffs to take annual or other periodic physical examinations at any age, even though many people develop heart disease, spinal-disc disease, or other conditions that disable them from hazardous physical activities long before they reach 55. Of course these tests are very far from being infallible, and this fact can be used to support a mandatory retirement age. But it cannot be the only support. The fallibility of fitness tests is significant only in relation to the consequences of retaining a physically unfit employee. It is one thing for a pilot to collapse at the controls of a plane and another thing for a bookkeeper to collapse while entering debits in a ledger. Obviously the rural policemen in this case are somewhere in between these extremes, and we can use the fact that their employer does not require any physical examinations to help place them nearer one end or the other. Since such examinations are useful both in spotting existing physical

disabilities and in identifying high-risk individuals, they are required by most employers who are seriously concerned with the physical fitness of their employees—airlines and the armed forces being the familiar examples. If Crawford County required such examinations it could argue (we need not decide with what success) that this showed the genuineness of its concern with the physical fitness of its deputy sheriffs; and this in turn would be an argument for a mandatory retirement age since as we have said physical examinations are not infallible tests of continuing fitness. But the premise is missing; the County does not require examinations.

The County, hoping to get some help from the fact that 55 is the mandatory retirement age for federal law enforcement officers (see 5 U.S.C. §8335(b)), presented evidence that the duties of Crawford County deputy sheriffs are similar to those of federal marshals. This means, it argues, that being younder than 55 must be a bona fide occupational qualification in this case, for otherwise Congress itself was not acting in good faith when in 1974, seven years after enacting the age discrimination law, it enacted the mandatory retirement law for federal law enforcement officers. This argument was accepted recently in *Johnson v. Mayor of Baltimore,* 731 F.2d 209 (4th Cir. 1984), which involved a mandatory retirement age of 55 for firemen (the federal statute makes 55 the mandatory retirement age for federal firemen as well as federal law enforcement officers). But *Orzel* and a number of other cases cited by the Fourth Circuit in *Johnson,* 731 F.2d at 216 n. 22, reject the argument. See 697 F.2d at 749-50.

To describe the federal statute as requiring retirement at age 55 is not completely accurate. The statute provides: "A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judg-

ment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age." 5 U.S.C. §8335(b). So if the employee is not eligible for immediate retirement under section 8335(c), or has not put in 20 years of service, or is exempted by the head of his agency, he can continue working after he reaches 55. Moreover, to make the fact that the federal government has imposed a mandatory retirement age on its own law enforcement officers conclusive on the question of whether such a retirement age is reasonable for state or local officers having similar duties would apply section 8335(b) far beyond its scope—would make a statute applicable only to federal officers applicable in effect to state and local officers as well.

The legislative history of section 8335(b), which explains the purpose behind the choice of age 55, may, it is true, be some evidence of what a "reasonably necessary" retirement age is for such officers. Legislative history is not a conventional form of "evidence"; but the age discrimination act is not a source of conventional legal duties. The determination whether a particular retirement age is reasonably necessary is sufficiently remote from the usual kinds of factual determinations courts are called on to make to justify the broadest possible conception of what is "evidence." In suggesting that the evidentiary showing made by the County was inadequate we hope we will not be misunderstood to mean that its inadequacy lies in its being unconventional.

In the legislative history of section 8335(b) we read "that these occupations [federal law enforcement and fire control] should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. They are occupations calling for the strength and stamina of the young rather than the middle aged. Older employees in these occupations should be encouraged to retire." S. Rep. No. 948, 93d Cong., 2d Sess. 2 (1974); see also

H.R. Rep. 463, 93d Cong., 1st Sess. 2-4 (1973). This is helpful to the County, but not very; for the failure to require annual physical examinations of its deputy sheriffs rather belies any claim that it thinks the sheriff's department should be composed of "active, vigorous, physically capable men." *Id.* at 3. Moreover, although the age-55 law applicable to federal law enforcement and firefighting personnel was on the books when Congress in 1978 amended the Age Discrimination in Employment Act to raise minimum mandatory retirement ages from 65 to 70, the legislative history of the amendments is inconsistent with the proposition that the age-55 law had established a precedent of general applicability to law enforcement officers. THe Senate Report states that "in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently." S. Rep. No. 493, 95th Cong., 2d Sess. 10-11 (1977). The County failed in this case to persuade the district judge that there was "a factual basis" for believing that "substantially all employees" aged 55 or older would be unable to perform their duties safely and efficiently because of the "particularly arduous" nature of the employment, and that medical or other objective tests to determine the capacity of older workers on an individual basis were infeasible.

In sum, and quite apart from the testimony given by the plaintiffs' expert witnesses (one of whom, we note, gave rather incredible evidence—that police officers ought to be allowed to work until they are 85), we think the district judge's finding that being under 55 is not a bona fide occupational qualification for a Crawford County deputy sheriff is not clearly erroneous and must therefore be upheld along with his conclusion that the County violated the Age Discrimination in Employment Act by

forcing the plaintiffs to retire when they reached 55. But we also agree with the district court that it was not a willful violation.

If it had been, the plaintiffs would be entitled to an award of liquidated damages equal in amount to their actual damages—or so at least the statutory language indicates. See 29 U.S.C. § 626(b), incorporating by reference section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. §216(b). The inference from the language is strengthened by the fact that Congress, some years after enacting the Fair Labor Standards Act, adopted as part of the Portal-to-Portal Pay Act of 1947 a provision allowing courts to make a smaller award of liquidated damages in a suit under section 16(b) if the employer was acting reasonably and in good faith. See 29 U.S.C. §260. This provision was not incorporated in the Age Discrimination in Employment Act. From this one can argue that the original section 16(b) (now 216(b)) gave the courts no discretion and that by not incorporating the ameliorative provision, section 260, Congress expressed its intention not to allow them that discretion in age discrimination suits either. Against this it can be argued that for all that appears the failure to incorporate section 260 was an oversight, and that in any event there is an element of unjust enrichment in a minimum-wage, child-labor, or maximum-hour case—the sort of cases to which the Fair Labor Standards Act applies—that is not found in most age discrimination cases.

Although the Fifth Circuit has held that there is discretion in an age discrimination case to award less than the full amount of liquidated damages provided for in section 216(b), *Hays v. Republic Steel Corp.*, 531 F.2d 1307, 1311-12 (5th Cir. 1976); *Hendrick v. Hercules, Inc.*, 658 F.2d 1088, 1095-96 (5th Cir. 1981); *Elliott v. Group Medical & Surgical Service, supra,* 714 F.2d at 558 n. 2, there is contrary authority, see *Goodman v. Heublein, Inc.*, 645 F.2d 127, 129 (2d Cir. 1981), and cases cited there, including a Third Circuit case that appears to overrule *sub silentio* an earlier Third Circuit case that had followed

Hays, the leading Fifth Circuit case. Compare *Wehr v. Burroughs Corp.,* 519 F.2d 276, 279 n. 5 (3d Cir. 1980), with *Rodriguez v. Taylor,* 569 F.2d 1231, 1244 (3d Cir. 1977). Two of our cases state, but without any elaboration, that an award of liquidated damages under section 626(b) "essentially doubles" the award for back pay and benefits. *Orzel v. City of Wauwatosa Fire Dep't, supra,* 697 F.2d at 757 n. 27; *Syvock v. Milwaukee Boiler Mfg. co.,* 665 F.2d 149, 156 (7th Cir. 1981). These were observations made in passing, not holdings. The issue (rightly described as unsettled in Schlei & Grossman, Employment Discrimation Law 524 (2d ed. 1983)) is not directly presented in this case. But as we shall see when we come to discuss the issue of prejudgment interest, it has tangential relevance.

The County's violation was not "willful" just because it knew it was forcing the plaintiffs to retire before the age of 70. The plaintiffs must show that the County should have known it was violating the Act. See *Orzel, supra,* 697 F.2d at 757-58; *Syvock, supra,* 665 F.2d at 156 and n. 10. With so many laws on the books requiring law enforcement officers to retire at 55, the County had no reason to think its mandatory retirement ordinance unlawful. It has been found unlawful only because the evidence that the County introduced at trial was not strong enough to persuade the trier of fact that the ordinance came within the exemption for jobs for which youth is a bona fide qualification. The County could not know when it discharged the plaintiff in 1979 that it would not be able to gather enough evidence to put on a convincing case at trial. Moreover, until 1982, when this court decided *Orzel,* the County had reasonable grounds for believing that the law making 55 the mandatory retirement age for federal law enforcement officers would carry the day for them. And until last year, when the Supreme Court decided *EEOC v. Wyoming,* 103 S. Ct. 1054 (1983), it also had reasonable grounds for believing that the Age Discrimination in Employment Act might be held unconstitutional as applied to

public officers engaged in law enforcement. Now it is true that in *Orzel* we upheld a finding of willful violation without reference to any of these sources of legal doubt, which were as much present in that case as they are in this. See 697 F.2d at 758-59. But there was much stronger evidence in *Orzel* than there is here that the employer had been advised by counsel that it was violating the law. And we were applying the clearly-erroneous standard to a finding that it had not been willful. The Age Discrimination in Employment Act does not require us to award liquidated damages—damages punitive in consequence though (as we shall see) not in purpose—of more than $115,000 against a small county whose total budget, we were told at argument, is only $3 million a year and whose total population is only 16,000, just because the County's lawyers failed to steer a straight course through rapidly changing legal currents.

A related issue is whether the plaintiffs were entitled to prejudgement interest on the amounts awarded as back pay. Although the Age Discrimination in Employment Act is silent on the matter, we have held that the district judge has the discretion to award prejudgment interest or deny it. See *Syvock v. Milwaukee Boiler Mfg. Co., supra,* 665 F.2d at 162; see also *Kelly v. American Standard, Inc.,* 640 F.2d 974, 982-83 (9th Cir. 1981). The power to make such an award is derived by combining the statutory language empowering the court "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of the" Act, 29 U.S.C. § 626(b), with the common law principle (on which see, e.g., *General Motors Corp. v. Devex Corp.,* 103 S. Ct. 2058, 2060 (1983); *Union Bank of Benton v. First National Bank,* 677 F.2d 1074, 1077, 1079 (5th Cir. 1982); Dobbs, Handbook on the Law of Remedies 165-66 (1973)) allowing prejudgment interest to be awarded where the obligation on which the defendant defaulted was a fixed sum. The obligation here was to pay the plaintiffs the wages to which they would have been contractually entitled if not forced to retire at 55.

If liquidated damages had been awarded, it could be argued that an award of prejudgment interest would be duplicative. The Supreme Court held long ago that the liquidated damages provision of section 216(b) is "compensation, not a penalty or punishment by the Government," *Overnight Motor Transport Co. v. Missel,* 316 U.S. 572, 583 (1942), and this holding is still the law despite the subsequent enactment of section 260, *Thompson v. Sawyer,* 678 F.2d 257, 281 (D.C. Cir. 1982). Among the items being compensated for is delay. *Marshall v. Brunner,* 668 F.2d 748, 753 (3d Cir. 1982). Although these are cases under the Fair Labor Standards Act, their analysis seems applicable to the Age Employment in Discrimination Act. The only form of compensatory damages that the Act explicitly allows is back pay. This makes it plausible to think that the liquidated damages provision was intended in whole or part to compensate victims of willful violations for other items of damage such as delay, rather than simply to punish the willful violator. A number of decisions accept this argument. See *Blim v. Western Electric Co.,* 731 F.2d 1473, 1479-80 (10th Cir. 1984)(per curiam), and cases cited there; *Spagnuolo v. Whirlpool Corp.,* 641 F.2d 1109, 1114 (4th Cir. 1981); cf. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 715 (1945); *contra, Criswell v. Western Airlines, Inc.,* 709 F.2d 544, 556 (9th Cir. 1983). But liquidated damages were not awarded here and we no not assume that by creating a liquidated-damages remedy for willful violations congress meant to deprive the district courts of all power to award prejudgment interest in cases of nonwillful violation. *Cline v. Roadway Express, Inc.,* 689 F.2d 481, 489 (4th Cir. 1982). When double damages are awarded, they usually will be far greater than would be necessary to compensate the plaintiff for delay—far greater, that is, than an award of prejudgment interest would be. Of course interest can mount up, but the short outside statute of limitatins (two or three years, unless tolled) makes it unlikely that it will mount up to the point where it is equal to the principal.

The only problem with the analysis is that, as we noted earlier, under the age discrimination law it is not certain that a plaintiff who proves a willful violation will automatically get double damages, that is, will be awarded the maximum liquidated damages. If he gets less than the maximum it may well be less than the amount of prejudgment interest that would be awarded in a nonwillful-violation case, so that as a practical matter a plaintiff would get more compensation if he did not prove a willful violation than if he did prove one. Congress could not have intended this result. But maybe the way around it is to hold that if the judge can award less than double damages in a case of willful violation (an issue we need not decide, as there was no willful violation here), he can award prejudgment interest as well in such a case, provided that the total award does not exceed double damages, and provided also that the liquidated-damages component is not intended to compensate the plaintiff for delay, since the award of prejudgment interest is designed to do that. Cf. *McClanahan v. Mathews,* 440 F.2d 320, 325 (6th cir. 1971). This seems a preferable solution to holding that there is no power to award prejudgment interest in any case of nonwillful violation. And all this assumes that an award of double damages is not automatic in a case of willful violation; many courts, as we have noted, think that it is automatic.

The only reason the district judge gave for not awarding prejudgment interest in this, a case of nonwillful violation, was that "the benefits of a later lump sum settlement which may be received and which can be invested offsets the diminished value of those dollars which may have been paid at an earlier date . . . ." In other words, if the plaintiffs had not been discharged but had continued receiving their salaries, they would in all likelihood have spent all or most of those salaries on living expenses and would have had little or nothing left over to invest, while they can invest the large lump sum that they will receive as back pay in this proceeding and the investment income will be a benefit that they would not have gotten if the defendants had

not forced them to retire. This is an interesting point but it does not convince us without explanation. We do not k now how the plaintiffs lived after they lost their jobs, though we do know that all three had some earnings from other jobs, some unemployment compensation, and some retirement benefits from the County—all these sources of invome having been deducted in figuring the award of back pay. If the plaintiffs borrowed money to maintain their previous standard of living and the back pay award will go largely to retiring those loans, then the interest on the loans will be an expense that the plaintiffs would not have borne if they had not been discharged. And if they did not borrow, but let their standard of living drop, that is a cost to them for which the interest income on the lump-sum back-pay award that they are now to receive could be viewed as reasonable, and certainly not excessive, compensation.

The usual assumption in economics as in life is that a doilar today is worth more than a dollar tomorrow, both because it can be invested and earn interest and because the future is uncertain. On that assumption the plaintiffs have lost something by having to wait years to receive the salary payments that it now turns out the defendants owed them, even if they did not borrow during the interim. But maybe there is something special about this case that overrides that assumption; this will be a matter for the district court to explore on remand along with any other equitable factors that might argue for or against an award of prejudgment interest, such as the County's finances. Unlike a violation of the minimum-wage law, this is not a case of withholding wages that are due to an employee for work actually performed; so there is not the element of unjust enrichment that persuaded the court in *McClanahan v. Mathews, supra,* 440 F.2d at 325-26, to adopt a strong presumption in favor of awarding prejudgment interest. Cf. *Argonaut Ins. Co. v. Town of Cloverdale,* 699 F.2d 417, 421 (7th Cir. 1983); *Myron v. Chicoine,* 678 F.2d 727, 733-34 (7th Cir. 1982). The County did not have the benefit of the plaintiffs' work after forcing them to retire. All we hold, therefore, is that the judge

has not yet adequately exercised his discretion in the matter of prejudgment interest.

We have left to decide only the attorneys' fees issues. The plaintiffs asked for fees and disbursements (excluding costs allowable under 28 U.S.C. § 1920) of (in round numbers) $67,000. The judge excluded all disbursements and awarded 50 percent of the attorney's fees requested, which made an award of $29,000, and the plaintiffs have appealed. The County concedes as it must that the plaintiffs, having prevailed on their age discrimination claim, are entitled to a reasonable attorney's fee. See 29 U.S.C. §§ 216(b), 626(b). It also acknowledges the applicability to this question of the case law that has developed under the more frequently invoked Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Although the Age Discrimination in Employment Act is not a civil rights act within the meaning of section 1988, age discrimination cases commonly cite section 1988 cases on fee questions, see e.g., *Vocca v. Playboy Hotel of Chicago, Inc.*, 686 F.2d 605 (7th Cir. 1982)(per curiam); *Spagnuolo v. Whirlpool Corp., supra,* 641 F.2d at 1115; *Cleverly v. Western Electric Co.*, 594 F.2d 638, 642-43 (8th Cir. 1979), and as the County does not question this practice neither shall we. Since the oral argument of this appeal, this court, joining the other circuits that have considered the question, has held that expenses of litigation that are distinct from either statutory costs or the costs of the lawyer's time reflected in is hourly billing rates—expenses for such things as postage, long-distance calls, xeroxing, travel, paralegals, and expert witnesses—are part of the reasonable attorney's fee allowed by the Civil Rights Attorney's Fees Awards Act. *Henry v. Webermeier,* Nos. 83-2228, 83-2349, slip op. at 3-4 (7th Cir. June 19, 1984). As we noted in that decision, any other conclusion would be arbitrary, since a lawyer's billing rate includes expenses that are indistinguishable from those that lawyers usually bill separately under the heading of disbursements or expenses rather than attorney's fees proper.

We also agree with the plaintiffs that the district judge should not have simply halved the amount of the fee that they requested. The judge thought the fee request excessive and he may well have been right; the County told us at argument that its total fee for this case was under $10,000. (Of course, since its lawyers failed to press the two-year statute of limitations at trial, or develop a strong case on the issue of youth as a bona fide occupational qualification, this may have been a false economy.) But rather than indicating which parts of the request he thought excessive, the judge simply cut the whole thing in half. This would be an appropriate way of proceeding in a case where the amount requested was small. If the plaintiffs were requesting, say $1,000, it wuld not be worth the judge's time to pore over the details of the request. As a former practitioner, he could quite properly use his impression of prevailing market rates in his district to cut down the request. But where as in this case the request is for a large amount of money, here more than $50,000, the judge must do more than eyeball the request and if it seems excessive cut it down by an arbitrary percentage. He has to make a judgment—considering the nature of the case and the details of the request, taking evidence if need be, and defending his judgment in a reasoned (though brief) opinion—on what the case should have cost the party who submitted the request. In this case some of the items seem excessive; among other things, $6,000 for preparing and presenting the attorney's-fee request itself seems much too large (nevertheless, by giving the plaintiffs half of what they requested, the judge in effect gave them $3,000 for preparing the fee request—which still seems like too much, though this is a matter for exploration on remand). The total bill seems altogether disproportionate to the scale of the case and to the County's attorney's fees, if they have been correctly represented to us (a matter the district judge can explore on remand). So in remanding we do not want to be understood as suggesting that the district judge cut the plaintiffs' fee request by too much. Maybe he cut it by too little; but he went about the cutting in the wrong way. In deciding what if

any deduction he should make because the plaintiffs dismissed several defendants and abandoned several legal theories in the course of the proceeding, he should of course be guided by the Supreme Court's recent decision in *Hensley v. Eckerhart,* 103 S. Ct. 1933 (1983).

To summarize, the judgment of the district court on the merits is affirmed except with respect to prejudgment interest; as to that, the case is remanced for further proceedings. The district court's award of attorney's fees is vacated and that matter also remanded for further proceedings. No costs will be awarded in this court.

So Ordered.

Floyd R. Gibson, *Senior Circuit Judge,* dissenting. I respectfully dissent from the majority's opinion. As a matter of fundamental fairness, I think that if Congress legislates that age 55 is a bona fide requirement for retirement for federal personnel in the field of law enforcement and firefighters, it ought not and should not under our constitutional system enact different and more stringent restrictions on the state and local units of government, thus imposing additional costs and expenses on the taxpayers, who are powerless and impotent to defend themselves or the public purse. In *Orzel v. City of Wauwatosa Fire Dept.,* 697 F.2d 743, 749 (7th Cir. 1983), this court recognized that Congress had exempted the Federal government from the requirements of the ADEA by establishing a mandatory retirement scheme for federal firefighters and law enforcement officers. Thus, as the court noted, mandatory retirement schemes enacted by Congress need only be "rationally related" to a permissible government objective. In contrast, under the ADEA, mandatory retirement schemes enacted by state and local governments "must not only be arguably rational, they must be *reasonably necessary* to the operation of the particular business in question." *Id.*

In *Orzel,* as in this case, the defendant argued that Congress could not have intended to exempt the federal government from the strictures of the ADEA and yet require that state mandatory retirement programs be subject to the statute. *Id.* However, the defendant in *Orzel* failed to adduce any evidence that is firefighters were operating under similar working conditions, or were performing significantly similar job functions, as federal firefighters. *Id.*

In this case, however, the defendants adduced evidence, and the district court so found, that the jobs of its law enforcement officers were similar to the jobs of federal law enforcement officers who are subject to mandatory retirement at age 55. Nevertheless, the district court held, and now this court affirms the holding, that state and local governments will be held to a higher standard of proof than the federal government in litigation that challenges the same situation. Whether the defendants in this case established a rational basis for the mandatory retirement program, is a question which would have to be determined on remand. I think the district court held the defendants to an inappropriate standard of proof.

It is both unfair and unconstitutional for federal courts to make state and local governments meet a higher standard of proof than the federal government is required to produce. In *Bolling v. Sharpe,* 347 U.S. 497 (1954), the Supreme Court noted that the Fifth Amendment did not contain the explicit guarantee of equal protection of the laws found in the Fourteenth Amendment. Nevertheless, the Court held that, while the notions of due process and equal protection are not interchangeable, there are some circumstances in which the notion of due process embodies the guarantee of equal protection. *Id.* at 498. This case presents one of those circumstances where, having imposed one standard on the states, it is "unthinkable" that the same Constitution applies a lesser duty on the federal government. *See id.* at 500. Congress is not entitled to establish one set of laws for the Federal govenment and another set of laws for everyone else

when those laws cover the same basic situation. In effect, the majority opinion allows Congress to establish a special set of circumstances under which the federal government may practice what it has determined to be discrimination. If this type of discrimination is justifiable, the government has not shown why or provided a reasonable or rationale basis for it. The issue is the propriety and legality of applying a double standard to this type of discrimination, one standard for the federal government and another standard for state and local governments. Because I believe that the federal, state, and local governments should be held to the same standard, whether that be the "rationally related" or "reasonably necessary" test, I would reverse and remand for future proceedings under the views here expressed.

A true Copy:

Teste:

Clerk of the United States Court
of Appeals for the Seventh
Circuit

ORDER AMENDING OPINION

The slip opinion in this case, issued on August 20, 1984, is amended as follows: On p. 21 of the opinion, in the fourth line following the paragraph break, the semi-colon after the word "right" is replaced by a period; the following clause, beginning "the County told . . . ," and the sentence in parentheses following that clause, beginning "(Of course, since . . . ," are deleted. Hence the second and third sentences of the paragraph will now read: "The judge thought the fee request excessive and he may well have been right. But rather than indicating which parts of the request he thought excessive, the judge simply cut the whole thing in half."

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

82-C-273

WESLEY N. HEIAR, KENNETH I. STRAUMAN, MYRL E. BROWN,

Plaintiffs,

v.

CRAWFORD COUNTY, WISCONSIN, WILLIAM FILLBACH, as Sheriff of Crawford County, ROBERT G. DILLMAN, Individually and as a member of the Crawford County Board, HOWARD H. EGSTAD, Individually and as a member of the Crawford County Board, AVERY R. FLANSBURGH, Individually and as a member of the Crawford County Board, DONALD E. HALE, Individually and as a member of the Crawford County Board, FRANK L. HENDRICKS, Individually and as a member of the Crawford County Board, ADRIAN HOFFLAND, Individually and as a member of the Crawford County Board, NELS KVALHEIM, Individually and as a member of the Crawford County Board and the Law Enforcement Committee of the Crawford County Board, A. R. LECHNER, Individually and as a member of the Crawford County Board, OBERT OLSON, Individually and as a member of the Crawford County Board, AMEL OPPRIECHT, Individually and as a member of the Crawford County Board, JOHN S. YOUNG, Individually and as a member of the Crawford County Board, and HARRY M. ZABEL, Individually and as a member of the Crawford County Board and the Law Enforcement Committee of the Crawford County Board,

Defendants.

FINDINGS OF FACT AND ORDER FOR JUDGMENT

Oral argument having been heard on April 13, 1983, the plaintiffs having appeared by DeWitt, Sundby, Huggett & Schumacher, by Robert M. Hesslink, Jr. and Joseph Hassler, and the defendants having appeared by Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, by David Leo Uelmen, the Hon. John C. Shabaz, District Judge, presiding, and the Court having issued its opinion from the bench now sets forth those facts which it finds:

FACTS

1. Plaintiffs Wesley N. Heiar, Kenneth I. Strauman, and Myrl E. Brown are adult male citizens of the United States and at all times material to this complaint resided in the County of Crawford, State of Wisconsin. All defendants were at all relevant times residing in the Western District of the United States Court for the State of Wisconsin.

2. Plaintiff Heiar is an adult male citizen of the United States residing in Prairie de Chien, Wisconsin. Prior to his retirement on June 30, 1979, plaintiff Heiar was employed by Crawford County and the Crawford County Sheriff's Department as a deputy sheriff with the classification of Patrolman 4.

3. Plaintiff Strauman is an adult male citizen of the United States residing in Prairie du Chien, Wisconsin. Prior to his retirement on June 30, 1979, plaintiff Strauman was employed by Crawford County and the Crawford County Sheriff's Department as a deputy sheriff with the classification of Sergeant of Traffic.

4. Plaintiff Brown is an adult male citizen of the United States residing in Prairie du Chien, Wisconsin. Prior to his retirement on September 9, 1979, plaintiff Brown was employed by Crawford County and the Crawford County Sheriff's Department as a Deputy Sheriff with the classification of Sergeant of Radio and Jailer.

5. The defendant Crawford County is a political subdivision and body corporate organized and existing under the Constitution and laws of the State of Wisconsin. Its principal place of business is the County Courthouse, 220 North Beaumont Road, Prairie du Chien, Wisconsin, 53821. It is and was at all times material to this complaint operating, financing and controiling a law enforcement department known as the Crawford County Sheriff's Department, providing for hiring, discharge, wages and working conditions of law enforcement employees known as Deputy Sheriffs.

6. Defendant William Fillbach is an adult resident of the State of Wisconsin and the County of Crawford, and is and was since 1974 the duly elected and acting Sheriff of Crawford County, Wisconsin.

7. All other defendants are duly-elected members of or former members of the Crawford County Board.

8. Plaintiff Heiar was born September 15, 1922.

9. Plaintiff Heiar was employed as a full time deputy sheriff of Crawford County from November, 1970 until June 30, 1979.

10. On June 30, 1979, plaintiff Heiar was involuntarily retired from his position as deputy sheriff of Crawford County, because he was over 55 years of age. He thereupon began drawing retirement benefits from the Wisconsin Retirement Fund.

11. At the time of his involuntary retirement, plaintiff Heiar was age 56 years and nine and one-half months.

12. Plaintiff Strauman was born May 24, 1924.

13. Plaintiff Strauman was employed by Crawford County as a full time deputy sheriff continuously from 1962 to June 30, 1979.

14. On June 30, 1979, Strauman was involuntarily retired from his position as deputy sheriff of Crawford County because

he was 55 years of age. At the time of his involuntary retirement he was 55 years of age and one month. He thereupon began drawing retirement benefits from the Wisconsin Retirement Fund.

15. Plaintiff Brown was born September 9, 1924.

16. Plaintiff Brown was employed by Crawford County as a full time deputy sheriff from 1969 until September 9, 1979.

17. On September 9, 1979, Brown was involuntarily retired from his position as deputy sheriff of Crawford County because he was exactly 55 years of age.

18. Plaintiffs at all times up to and including their mandatory retirements satisfactorily performed their duties as deputy sheriffs.

19. Subsequent to their involuntary retirements the plaintiffs were all replaced by younger persons.

20. None of the plaintiffs had suffered on the job injuries at the time of their forced early retirements, and none had had excessive sick leave records.

21. In June, 1977 the issue of compulsory retirement of deputy sheriffs at age 55 was discussed between the Law Enforcement Committee of the Crawford County Board and the Union representing the employees. The specifics of the age of retirement were discussed and explained. A motion was adopted requiring that notice be given to all employees of this retirement policy.

22. In September, 1977 the Union asked the Committee to reconsider the mandatory retirement policy. The Committee refused to reconsider it. However, an extension was granted to plaintiff Heiar so as to preclude his compulsory retirement until October 1, 1977 and from month to month thereafter. The extension lasted until June 30, 1979 when Heiar was 57 years of age.

23. On March 30, 1979 a notice was given that the Crawford County Board of Supervisors would consider adopting a resolution requiring the mandatory retirement of all protective classification employees at age 55. On April 17, 1979 the following resolution was adopted by the County Board:

> Now therefore, be it resolved, that it is the policy of Crawford County, Wisconsin that all non-elective protective occupation participants in the employ of said county cease employment for said county on the day on which said protective occupation participants of the Wisconsin Republic [sic] Employees Retirement Fund reaches the age of fifty-five (55) years.

24. Circuit Judge Michael Kirchman, a circuit judge for Crawford County, had attended the meeting of the Crawford County Board and urged the Board to consider each officer individually.

25. Sheriff Fillbach had no responsibility for the decision to retire the plaintiffs, or to pass the resolution.

26. At the time the resolution was adopted, the Department consisted of the following classifications and persons:

Sheriff
William C. Fillbach

Chief Deputy
Roger C. Lund

Investigator and Traffic Officer
Robert Ostrander

Traffic Officers
Sgt. Kenneth Strauman
Frederick Brockway
Wesley Heiar
Terrence Zinkle

Radio Operators/Jailers
Sgt. Myrl Brown
Patrick May
Gary Sprosty
Mary Nash
Gary George

Secretary
Ruth Jackley

Janitor
George Ingle

27. On April 19, 1979 a written notice was given to all employees stating the mandatory retirement policy. [No charge was filed with the state or federal agencies protesting this notice or the implementation of this policy within 180 days.]

28. On April 20, 1979 notice was given to plaintiff Heiar that he would be compelled to retire as of June 30, 1979. [No charge was filed by the plaintiff Heiar protesting this notice or this action within 180 days.]

29. None of the three plaintiffs filed requests for an extension of their employment beyond the actual date they retired, except Heiar, as noted earlier.

30. Plaintiffs were involuntarily retired pursuant to this express, officially adopted, written policy of defendant Crawford County.

31. Prior to the retirement of Heiar and Strauman, no employee of the Crawford County Sheriff's Department had ever been involuntarily retired because of age.

32. At the time of plaintiffs' mandatory retirement, defendants affirmatively represented that the County would comply with the Age Discrimination in Employment Act of 1967, protecting persons between the ages of 40 and 70.

33. None of the plaintiffs were asked to sign or did sign individual written waivers of their rights under the Wisconsin Retirement Fund or the Age Discrimination in Employment Act of 1967, as amended.

34. Prior to this trial, the defendants have not altered or amended the mandatory retirement policy of Crawford County or offered to reinstate any of the plaintiffs.

35. Some duties performed by deputy sheriffs require quick and immediate reaction and response. These duties include:

A. Traffic patrol at high rates of speed.

B. Immediate and sudden confrontation with persons stopped by the patrol.

C. Being called to local situations of a potentially serious and dangerous nature, including robberies in progress, burglaries in progress, dangerous fights and crowd demonstration.

D. Patrolling of river during emergencies, including search parties at night and in inclement weather.

36. As human beings increase in age, the incidence of disability increases. Furthermore, heart ailment claims increase with age for this classification of employee.

37. Deputy Sheriffs have a responsibility for public safety, are exposed to a high degree of danger or peril, and are required to maintain a level of physical conditioning greater than in other occupations. Because of these factors, the age for normal retirement of police and fire personnel is earlier than for other employees.

38. The medical evidence shows that some persons above the age of 55 are unable to effectively perform the duties of the job of law enforcement officers. That is, at least some employees over the age of 55 possess traits which disqualify them from the continuing performance of their duties.

39. Tests exist and existed at the time plaintiffs were involuntarily retired which could reasonably determine the continued capability of persons age 40 to 70 to perform law enforcement duties of the type performed by the plaintiffs.

40. At the time of plaintiff's involuntary retirements, Crawford County did not have an annual medical check-up, physical fitness requirement or an ongoing physical fitness program for any of the deputized employees of the Sheriff's Department.

41. Crawford County did not in 1979 or prior thereto, and does not now, require incumbent deputy sheriffs to pass a regular fitness test or medical examination in order to retain their jobs.

42. Prior to the decision to compel Sergeant Strauman, Sergeant Brown and Patrolman Heiar to retire, defendants did not review plaintiffs' personnel files or request a medical opinion to determine if they were fit for their jobs.

43. The Crawford County Sheriff's Department currently has no physical, mental or medical requirements for deputy sheriffs age 54 and younger.

44. At the time of plaintiffs' involuntary retirements, defendants knew or had adequate means to determine that plaintiffs were all in good physical health and able to continue to perform their duties.

45. Prior to adoption and observances of defendants' mandatory age 55 retirement rule, there was no medical evidence presented to the County Board relating to the relationship between advancing age and a deputy sheriff's ability to respond to responsibilities and duties.

46. Prior to this litigation neither Sheriff Fillbach nor Crawford County conducted any studies to determine whether, for the type of work performed by the plaintiffs, performance is affected by age.

47. Prior to this litigation neither Sheriff Fillbach nor the County conducted any studies to determine whether the performance of any duputy sheriff work is affected by age.

48. Defendants did not, prior to plaintiffs' involuntary retirement or at any time thereafter, conduct any studies to determine whether performance of the duties of deputy sheriff of Crawford County is affected by age.

49. No evidence was presented to the County or Fillbach that Sergeant Strauman, patrolman Heiar, or Sergeant Brown had not been performing his duties in a satisfoctory manner.

50. Performance of the duties of deputy sheriff of Crawford County in the classifications of "patrolman," "sergeant of traffic" or "jail sergeant" does not require being less than age 55 or less than age 56, none and one-half months.

51. The plaintiffs are presently physically qualified to perform the duties of the positions from which they were involuntarily retired.

52. Sheriff Fillbach and the County have no mandatory retirement age for the chief deputy sheriff.

53. The chief deputy sheriff of the Crawford County Sheriff's Department is age 54.

54. Pursuant to federal mandatory retirement statutes, the United States Government compelled U.S. Deputy Marshal William Banta of the Western District of Wisconsin to retire at age 55. Marshal Banta was retired in 1983.

55. The duties performed by United States Deputy Marshals are similar in many respects to the duties performed by the deputy sheriffs in various counties of Wisconsin, including Crawford County. These duties performed by both county deputies and US deputy marshals are as follows:

A. Service of process.

B. Service of subpoenas.

C. Securing into custody persons charged with crimes.

D. Maintaining the security of persons charged with crimes.

E. Making arrests.

F. Handling firearms and other protective devices in the course of their duties.

56. Some duties performed by FBI agents are similar to those law enforcement duties performed by deputy sheriffs in Wisconsin counties, including Crawford County.

57. The defendant Crawford County has been, at all material times, party to a collective bargaining agreement with Local 1972 of the American Federation of State, County & Municipal Employees, AFL-CIO. This union is the certified bargaining agent for all of the employees employed within the Sheriff's Department of the defendant county. All three plaintiffs were members of, and were represented by, the Union in all matters involving terms and conditions of employment. Under Wisconsin law the agency of the Union to represent these employees was exclusive.

58. The 1979-80 collective bargaining agreement in effect at the time of plaintiffs' mandatory retirements limited the County's right to discharge deputy sheriffs to "just cause." It stated:

> 11.02 Any employee may be demoted, suspended, or discharged or otherwise disciplined for just cause.

59. The agreement, signed April 9, 1979, covering plaintiffs' positions in effect at the time of their involuntary retirements did not contain a specific provision which provided for the mandatory retirement of members of the bargaining agreement was approved by the law Enforcement Committee after adoption of the Resolution providing for mandatory retirement of nonelected deputy sheriffs at age 55. The agreement also states:

11.04 Any suspended or suspension pending discharge employee may appeal such action through the grievance procedure and shall initiate grievance action by immediate recourse to the Law Enforcement Committee in accordance with Step One within ten (10) days of notice of suspension or suspension pending discharge.

12.01 The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. Should a grievance arise whether in reference to a question of interpretation of the Agreement or to a question relating to safety and/or other matters, the grieving employee shall first bring the complaint to the steward or Grievance Committee of the Union. If it is determined after investigation by the Union that grievance does exist, it shall be processed in the manner described below:

61. At no time did any of the three plaintiffs file a grievance protesting their compulsory retirement. At no time did any of these plaintiffs file a grievance protesting that their termination was without just cause. At no time did any of the three plaintiffs or their union make any claim that the compulsory retirement was a violation of the employment contract negotiated between the defendant county and the union. At no time was the grievance procedure of the labor agreement invoked to protest the retirement of these three plaintiffs.

62. The defendant Crawford County does not maintain a separate retirement system for its employees. The defendant is compelled by the statutes of the State of Wisconsin to make contributions to the Wisconsin Retirement Fund on behalf of all its employees at rates specified by the state. The Wisconsin Retirement Fund (WRF) is administered by the state.

63. The defendant county has participated in the Wisconsin retirement system at least since 1948.

64. The County Clerk is the defendants' agent for handling the retirement matters for the WRF.

65. At the time of plaintiffs' mandatory retirements, most protective occupation participants were ramaining in service after age 55.

66. None of the plaintiffs is receiving full retirement benefits (defined as 50% of final rate of earnings) under the Wisconsin Retirement Fund.

67. Individuals with less than 20 years of service under WRF who are forced to retire early cannot qualify for any military service credit under Wis. Stat. §41.09(3)(c).

68. In December, 1979, all three plaintiffs filed charges with the State Agency, the Department of Labor, Industry & Human Relations, Equal Rights Division. The charge alleged that they had been compelled to retire at age 55.

69. The Equal Rights Division responded as follows:

> We are unable to investigate your claim of discrimination against the Crawford County Sheriff's Department because Wisconsin's Fair Employment Law does not cover age discrimination against any hazardous type occupation such as law enforcement or fire fighting.

A handwritten message attached to the letter advised the plaintiffs to contact the federal agency and provided them with the address.

70. On December 3, 1979, plaintiff Heiar wrote to the Equal Employment Opportunity Commission in Milwaukee requesting permission to file a complaint of age discrimination, and to Crawford County District Attorney notifying him of this complaint.

0 71. In response to this letter, the Equal Employment Opportunity Commission (EEOC) in Milwaukee on December 10, 1979, notified plaintiff Heiar that it would be necessary for him to arrange for a personal interview. This personal interview took place on December 18, 1979, and a written record thereof

was personally signed by Mr. Heiar and witnessed by Robert A. Kroncke, Intake Officer, on December 18, 1979.

72. Notice of the filing of Heiar's complaint was forwarded to County of Crawford Sheriff's Department, December 21, 1979 by Gerald Nicholas, Intake Supervisor. At the same time Kathleen Blunt, District Director, EEOC, Milwaukee, filed a copy of Heiar's complaint with the Wisconsin Department of Industry, Labor & Human Relations, Division of Equal Rights, 201 East Washington Avenue, Madison, Wisconsin.

73. Filings were made by plaintiff Kenneth I. Strauman at the same time filings were made by plaintiff Heiar, with the exception that the letter filing by Kathleen Blunt with the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations and notice to the Crawford County Sheriff's Department was made December 20, 1979.

74. Plaintiff Myrl E. Brown filed a letter of complaint of age discrimination with the Milwaukee EEOC December 7, 1979. His Intake Interview form was signed January 4, 1980 and forwarded thereafter to the Commission's office in Milwaukee. A notice of filing of Brown's complaint was forwarded by EEOC, Milwaukee, to the Wisconsin Department of Industry, Labor & Human Relations, Division of Equal Rights, in Milwaukee (DILHR) under date of January 8, 1980, signed by Kathleen Blunt, District Director, as Certified Letter No. 6739084. Notice was sent to the Crawford County Sheriff's Department on the same date.

75. Subsequent to the filing of plaintiffs' charges, conciliation was undertaken by EEOC.

76. The results of EEOC's attempted conciliation were unsuccessful. On March 18, 1982, all plaintiffs were notified by letter signed by Wesley N. Harry, acting for Joseph W. Wiley, acting District Director, EEOC Milwaukee, with carbon copies to County of Crawford, Sheriff's Department, Prairie du Chien,

Wisconsin, 53821, that EEOC's attempted resolution of the matter by informal conciliation, conference and persuasion had been unsuccessful and EEOC would take no further action.

77. Plaintiffs commenced this action by complaint filed April 16, 1982.

And upon the foregoing facts as found by the Court and the conclusions of law and opinion rendered from the bench.

ORDER

IT IS ORDERED that judgment be entered as follows:

In favor of the defendant William Fillbach and against the plaintiffs, DISMISSING their complaint against him with prejudice and costs;

In favor of the plaintiff Wesley N. Heiar and against the defendant Crawford County for the amount of $41,251.42, together with costs;

In favor of the plaintiff Kenneth I. Strauman and against the defendant Crawford County for the amount of $35,097.99, together with costs;

In favor of the plaintiff Myrl E. Brown and against the defendant Crawford County for the amount of $45,309.71, together with costs;

In favor of said plaintiffs and against the defendant Crawford County for reinstatement of those positions which the plaintiffs held on the dates of their involuntary retirement, said reinstatement to be effective not later than May 13, 1983, the plaintiffs to be compensated during that interim period in accordance with the rate of pay found by the Court to be applicable.

Let judgment be entered accordingly.

Entered this 15th day of April, 1983.

BY THE COURT:

JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

82-C-273

Wesley N. Heiar, Kenneth I. Strauman,
and Myrle E. Brown,
Plaintiffs,

v.

Crawford County, Wisconsin, et al.,
Defendants.

ORDER

The Memorandum and Order of March 3, 1983 is hereby AMENDED in the following respects:

On page 7, the first paragraph should read:

> Utilizing such a functional approach, recent decisions have accorded absolute legislative immunity to local officials acting in a legislative role. *Bruce v. Riddle,* 631 F.2d 272, 279 (4th Cir. 1980); *Hernandez v. City of LaFayette,* 643 F.2d 1188, 1193 (5th Cir. 1981) *cert. denied,* 455 U.S. 907 (1982); *Gorman Towers, Inc. v. Bogoslavsky,* 626 F.2d 607, 611-612, (8th Cir. 1980); *Kuzinich v. County of Santa Clara,* 689 F.2d 1345, 1349 (9th Cir. 1982).* *Contra: German v. Killeen,* 495 F.Supp. 822, 830-831 (E.D.Mich, 1980).*

On page 7, in the second paragraph, an asterisk should be placed after the first full sentence: "The question of absolute immunity for local officials performing legislative acts is not settled in the Seventh Circuit.*"

On page 7, the asterisk should refer to this notation: "After the entry of this decision, the Court of Appeals for the Seventh Circuit resolved the issue of legislative immunity for local officials. After citing *Gorman Towers, Bruce, Hernandez,* and *Kuzinich,* the Court of Appeals wrote: 'We think these decisions are correct....' *Reed v. Village of Stonewood,* Case No. 82-2190, slip op. at 12 (7th Cir. April 5, 1983)."

Footnote 8 should read: *See Blake v. Town of Delaware City,* 441 F.Supp. 1189, 1200-1201 (D.Del. 1977). *Cf. Visser v. Magnarelli,* 542 F.Supp. 1331 (N.D.N.Y. 1982) (purely administrative decision of city counsel outside the scope of absolute legislative immunity).

In footnote 9, the second sentence should be deleted.

In all other respects, the Memorandum and Order remain unchanged.

Entered this 14th day of April, 1983.

BY THE COURT:

/s/ JOHN C. SHABAZ
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 82-C-273

Wesley N. Heiar, Kenneth I. Strauman,
and Myrl E. Brown,
Plaintiffs,

v.

Crawford County, Wisconsin, et al.,
Defendants.

STENOGRAPHIC TRANSCRIPT

of Ruling by the Court had upon hearing in the above-entitled civil action in said court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable JOHN C. SHABAZ, Judge, presiding, on Wednesday, the 13th day of April, 1983, commencing at 5:45 p.m. in the afternoon.

APPEARANCES

DeWITT, SUNDBY, HUGGETT & SCHUMACHER, S.C. Attorneys at Law, 121 South Pinckney Street, P. O. Box 2509, Madison, Wisconsin, 53701, by ROBERT M. HESSLINK, JR., and JOSEPH J. HASLER, appeared on behalf of the plaintiffs.

GOLDBERG, PREVIANT, UELMEN, GRATZ, MILLER & BRUEGGEMAN, S.C., Attorneys at Law, 788 North Jefferson Street, Milwaukee, Wisconsin, 53202, by DAVID LEO UELMEN, appeared on behalf of the defendants.

PROCEEDINGS

(Whereupon, said portion of proceedings in the above-entitled civil action was commenced in open court as follows:)

THE COURT: I realize your attempt, Mr. Uelmen, to show the similarity of duties, to show the nexus. I don't believe, however, that the language at specifically Page 10 of the *Orzel v. Wauwatosa* decision allows the defendants to prevail.

I've read the language perhaps almost as often as you have, counsel, throughout this entire trial; practically memorized it. I knew exactly where you were coming from. I know exactly what you are attempting to do. But I think that the Seventh Circuit is saying that the type of evidence which has been produced in this case does not allow the defendants to prevail in this matter.

I have accepted all of the uncontested material facts which you have provided. The Court is going to render a decision at this time and reserves the right to amplify and expand upon that decision after reading the transcript of the remarks which this Court will now have placed upon the record.

There are certain additional facts which the Court does find. It accepts, as indicated, the uncontested material facts; and this Court will have published its findings of fact in full and will not at this time belabor you gentlemen with the reading of those because I have taken those material facts which you believe to be uncontested and have revised them placing them in what I believe to be, in some instances, a more logical order. But I am going to set forth at least some of the additional findings of fact which I think are important at this time. One is that which Mr. Hesslink addressed at the outset of this argument.

And I specifically find that on or about September 9, 1979 the plaintiff, Brown, was involuntarily retired from his position as Deputy Sheriff of Crawford County because he was exactly 55 years of age.

I would also like to address you to the mandatory retirement policy and indicate that this Court finds that in June of 1977 the issue of compulsory retirement of deputy sheriffs at age 55 was discussed between the Law Enforcement Committee of the

Crawford County Board and the Union representing the employees.

Now the specifics of the age of retirement were discussed and explained; and a motion was adopted requiring that notice be given to all employees of this retirement policy.

In September, 1977, the Union asked the Committee to reconsider taht retirement policy and the Committee refused to consider it. However, an extension was granted to the plaintiff, Heiar, as to preclude his compulsory retirement until October 1, 1977, and from month to month thereafter; and that extension lasted until June 30 of 1979 when Heiar was 57 years of age.

On March 30th, the Court finds, of 1979, a notice was given that the Crawford County Board of Supervisors would consider adopting a resolution requiring the mandatory retirement of all protective classification employees at 55; and on April 17, 1979 that resolution was adopted by the County Board.

That resolution has been previously set forth upon the record on several occasions. I think the Court should repeat it at this point:

"Now, therefore, be it resolved, that it is the policy of Crawford County, Wisconsin that all non-elective protective occupation participants in the employ of said County cease employment for said County on the day on which said protective occupation participants of the Wisconsin—and there it was Republic Employees Retirement Fund—reaches the age of 55 years." That resolution was adopted.

I'd like to make the specific finding that Sheriff Fillbach had no responsibility for the decision to retire the plaintiffs in any way or to pass the resolution. It appeared that Sheriff Fillbach was concerned with on occasion, as legislative bodies do, would those persons upon whom they wish to receive information.

In the legislature we used to call it "for information purposes only." They would register neither for nor againt. And when

they give information, when they appear for information only, you don't expect them to fight hard one way or the other.

At the time that the resolution was adopted the department consisted of, the Court finds, the following: the Sheriff, William Fillbach; Chief Deputy Roger C. Lund; and there was the Investigatory and Traffic Officer Robert Ostrander; and there were the Traffic Officers, the Plaintiff, Sergeant Kenneth Strauman, Frederick Brockway, and the Plaintiff, Wesley Heiar, and Terrence Zinkle; and the Radio Operators/Jailers, Sergeant Myrl Brown, Patrick May, Gary Sprosty, Mary Nash, Gary George; Secretary, Ruth Jackley; and Janitor, George Ingle.

The Court further finds that on April 19, 1979 a written notice was given to all employees stating the mandatory retirement policy. The Court will agree that no charge was filed with the state or the federal agencies protesting this notice or the implementation of this policy within 180 days after April 19th of 1979.

The Court will also find that on April 20th of '79 the notice was given to the Plaintiff, Wesley Heiar, that he would be compelled to retire as of June 30th of '79; and, again no charge was filed by this plaintiff protesting this notice or this action with the 180 days after April 20th of '79.

And the Court will also find that none of the plaintiffs filed requests for extension of their employment beyond the actual date that they retired, except for Mr. Heiar; and we have previously referred to that.

At the time of the mandatory retirement the defendants did represent that they would comply with the Age Discrimination in Employment Act protecting persons between the ages of 40 and 70; and I think you can find that in serveral documents, looking at the application for employment of Mr. Matusek (ph) indicates, just as I have stated, that the Age Discrimination in

Employment Act of 1967 prohibits discrimination on the basis with age with respect to individuals who are not at least 40 but less than 70 years of age.

This was on an application for employment which was made by this individual on April 27th of 1979. His employment was for the position of deputy.

The Court would like to refer to some of the duties which were performed by the deputy sheriffs because they do require quick and immediate reaction and response. And those include the traffic control at high rates of speed.

The officers testified there is the necessity for immediate and sudden confrontation when a person is stopped by the patrol; being called to local situations of a potentially serious and dangerous nature, including robberies in progress, burglaries, dangerous fights, crowd demonstrations, house calls; and, of course, the patroling of river during emergencies, including search parties.

The Plaintiff Brown testified to the fact that he was engaged in that often and that he was known—I think he told us he was a river rat and was known to be doing quite a bit of that.

Now the Court does find that human beings, as they increase in age, the disability increases; that heart ailment claims do increase with age for this classification of employment.

The Court finds that deputy sheriffs have a responsibility for public safety and are exposed to a high degree of danger or peril, and are required to maintain a level of physical condition greater than in other occupations. And because of these factors the age for normal retirement of police and fire personnel is earlier than for other employees.

But the medical evidence shows that some persons above the age of 55 are unable to effectively perform the duties of the job of law enforcement. That is, that at least some employees that

are over the age of 55 possess traits which disqualify them from the continued performance of their duties.

However, tests exist and existed at the time plaintiffs were involuntarily retired which could reasonably determine the continued capability of persons age 40 to 70 to perform law enforcement duties of the type performed by the plaintiffs.

The Crawford County Sheriff's Department currently does not have physical, mental or medical requirements for deputy sheriffs age 55 and younger.

At the time of the involuntary retirement of the three plaintiffs, the defendants knew or had adequate means to determine that the plaintiffs were in good health and able to continue to perform their duties. This could have been determined.

Prior to the adoption and the observances of defendants' mandatory age 55 retirement rule, there was no medical evidence presented to the County Board relation to the relationship between advancing age and a deputy sheriff's ability to perform and to respond to the responsiblities and duties.

And prior to this litigation neither Sheriff Fillbach nor Crawford County conducted any studies to determine whether, for the type of work performed by plaintiffs, performance is affected by age.

An examination of the documents which were submitted by Blair Testin, on behalf of the Wisconsin Retirement Research Committee, would also indicate that the legislature made this same type of determination without having before it the necessary studies which would allow them to determine that the type of work performed by persons employed in the type of activity of plaintiffs, that that work would be affected by age.

The defendants did not, prior to the plaintiffs' involuntary retirement or at any time, conduct any studies—at least the Court can't find any studies whatsoever—to determine whether

performance of the duties of deputy sheriff of Crawford County is affected by age.

Performance of the duties of the deputy sheriff of Crawford County in the classification of "patrolman," "sergeant of traffic," or "jail sergeant" does not require being less than the age of 55 or less than the age of 56 and nine and one-half months.

An examination was conducted, a physical examination. Albeit the physical examination of the plaintiffs lasted approximately 25 minutes. However, the plaintiffs were presently found to be physically qualified to perform the duties of the positions from which they were involuntarily retired.

The sheriff and the County have no mandatory retirement age for the Chief Deputy Sheriff, Mr. Lund.

The Court has reexamined the federal mandatory requirement statutes of the United States Government to compel U.S. Deputy Marshal William Banta of the Western District of Wisconsin to retire at 55. And Marshal Banta was retired in 1983 pursuant to the federal mandatory statutes.

The Court would also find that the duties performed by United States deputy marshals are similar in many respects to the duties performed by deputy sheriffs in various counties of Wisconsin, including Crawford County. And those duties performed by both county deputies and U.S. marshals are the service of process, the service of subpoenas, securing into custody persons charged with crimes, maintaining the security of persons charged with crimes, making arrests, handling firearms and other protective devices in the course of their duties.

Other duties were described by the witnesses who told us of the similarities between the two. And there are some very similar duties.

And, again, this is not the appropriate time because we are still on the findings of fact; but I understand the reason that

counsel provided this information believing that this would show the similarity of these occupations, the federal firefighter. Wauwatosa firefighter in the Orzel case, in this case, Deputy Marshal, Crawford County Sheriff's Deputy. And I would suppose that those similar duties have been shown and I will so find.

I have referred to the uncontested statement of facts that I am not reading into the record at this time because they will be a part of these findings of fact.

But I do think we should refer to the Collective Bargaining Agreement with the Union, which is the certified bargaining agent for all of the employees employed within the Sheriff's Department. And all three members were represented by the Union. There was a Collective Bargaining Agreement available and there was the Union involvement on the part of the three plaintiffs.

The Court does refer to 11.04 of that Collective Bargaining Agreement; and the Court finds that at no time did any of these three plaintiffs file a grievance contesting the compulsory retirement. At no time did any of these plaintiffs file a grievance protesting that their termination was without just cause. At no time did the three plaintiffs or their union make any claim that the compulsory retirement was a violation of the employment contract negotiated between the parties; and at no time was the grievance procedure of the labor agreement invoked to protest the retirement of the three plaintiffs, nor did the plaintiffs attempt to do anything to protest that particular involuntary retirement.

Crawford County does not maintain a separate retirement system for its employees. The Defendant, Crawford County, is compelled by the statutes of the state to make contributions to the Wisconsin Retirement Fund on behalf of all its employees; and that retirement fund is administered by the state.

The defendant county, I believe, has participated in the Wisconsin Retirement System at least since 1948.

At the time of the plaintiffs' mandatory retirements, most protective occupation participants were remaining in service after age 55.

After the examination of these additions to the uncontested material facts, the Court will set forth those additional findings which it believes to be appropriate. But at the outset the Court's going to conclude that this Court, of course, has jurisdiction of the action of the parties as indicated under 29 USC 626, 42 USC 1983, 28 USC 1343 and 1331 and to issue declaratory relief pursuant to 28 USC 2201 and 2202.

As a conclusion of law Defendant Crawford County is an employer within the meaning of the Age Discrimination in Employment Act of 1967 as amended.

At the time of their mandatory retirements in 1979 the plaintiffs were employees of Crawford County within the protected age groups of ADEA; and the plaintiffs had made all necessary filings with the Equal Opportunity Commission and the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations, as required by ADEA and the Wisconsin Fair Unemployment Act.

The Court has examined the position that this is outside the statute of limitations. It finds that that just can't be. You don't file from the time that the policy is enacted. You file from the time that you're either retired or not promoted, or not hired, or whatever that particular act might be.

I would also conclude that the evidence presented at trial did not establish that the defendant, Sheriff Fillbach, had any significant role in the decision to adopt the mandatory retirement policy or the involuntary retirement policy of the plaintiffs. The Court finds no liability against the Defendant Fillbach whatsoever. And there was also to be found no liability, as

previously indicated, against individual members of the County Board.

I would like to address the due process claim. I've always had some difficulty with understanding why that claim was here. I'll be very frank with you, gentlemen. The substantial arguments which were made on both sides still leave me wondering. To prevail on the claim, the plaintiffs had to prove two contentions under the due process violation; that the plaintiffs held the property or liberty interest of constitutional dimensions and continued employment as deputy sheriffs in Crawford County and that such interests were taken without a hearing or other process.

And I would cite the *Board of Regents v. Roth,* 408 U.S. 564. Now for the purpose of this analysis, the Court will assume that plaintiffs did hold the cognizable property or liberty interest in continued employment. But I cannot see where the second Roth condition has been satisfied.

And as indicated in the statement of facts, the plaintiffs had available to them a full opportunity to be heard by way of not only the contractual grievance procedure, but by the fact that Wesley Heiar had previously appeared before the Board. And Nels Kvalheim stated that he was kind of waiting for him to show again. Plaintiffs did not avail themselves of any procedure. And the plaintiffs do not now suggest that the contractual grievance process was insufficient to protect their rights.

And this Court will not require, of course, the parties to engage in futile acts; but the Court finds no evidence that plaintiffs' right to continued employment was not protected by the grievance procedure, or the opportunity to request a hearing, or to appear before the duly-appointed Law Enforcement Committee of the County Board.

And, in short, plaintiffs claim they were terminated without due process. The fact is that the process which was due the

plaintiffs was available and the plaintiffs failed to pursue those remedies under the grievance procedures, or a hearing before the law Enforcement Committee, and should not now expose the defendants to liability in this case. They were allowed to be heard; they did not request it.

I think that we should dispose of the further argument under *Burkey v. Marshall. The argument appears to be advanced by defendants that because of the fact that the individual defendants were previously dismissed because of what this Court found to be absolute Legislative immunity, that now the county cannot be held liable.*

And I am sure I must have misunderstood that argument because I have re-read Burkey and that has to do with a 1983 cause of action. The County Board of Education in West Virginia was entitled to the protection of the Eleventh Amendment immunity for actions under 48 USC 1983.

Now I suppose this is interesting, perhaps, in the relevance of this case; but it's somewhat mysterious. In this case the Court's going to award damages but not on 1983 but under a specific statutory language of the Age Discrimination in Employment Act.

Although the defendants referred to some silver lining in the *EEOC v. Wyoming* decision, this Court searched that decision very carefully for the silver lining that Mr. Uelmen has found; and perhaps Mr. Uelmen, being more perceptive in this matter, has found that silver lining. But certainly I don't believe anyone is suggesting that this Court is to adopt Judge Brimmer's decision as it concerns the Tenth Amendment application which he made to game wardens and indicate that there is to be some nonapplication in this case.

The immunity the defendants claim to protect, or the County, has been abrogated by the passage of the ADEA. I don't think we have to go much beyond *Quern v. Jordan* in 440 U.S. 332,

which held that the Eleventh Amendment immunity is abrogated by an Act of Congress if the act explicitly and by clear language indicates on its face an intent to sweep away the immunity of the states and, too, the act has a history which focuses directly on the question of liability and which shows that Congress considered and finally decided to abrogate the Eleventh Amendment immunity of the states.

Both of the decisions are satisfied by defining "employer" to include a state or political subdivision of a state under 29 USC 630(b)(2). Congress even went so far as to define the term "state" and, therefore, I find that Burkey does not apply and that Crawford County may be held liable.

Now I realize that the decision of this Court is going to satisfy no one. The plaintiffs are asking for the moon; the defendants are offering nothing. And so that makes a little lawsuit, I guess.

The fact is that the Court will specifically find that age 55 is not a bona fide occupational qualification for the physical work required of law enforcement personnel of Crawford County. Maybe somewhere, but not in Crawford County.

Being less than 55 years of age is not a bona fide occupational qualification for the position of deputy sheriff of Crawford County; and, also, the Wisconsin Retirement System for protective occupation employees is not a bona fide occupational qualification as defined by the ADEA.

Based on all the evidence the Court concludes the Defendant Crawford County violated the plaintiffs' rights under the Age Discrimination in Employment Act.

And I think that counsel is to be applauded for attempting, on the part of the defendants, to find those exceptions. The Court believes, however, that his decision which it's going to give is, perhaps, just a reinvention of the wheel of the Orzel decision and those which it believes are controlling not only in the Seventh Circuit, but by the Supreme Court.

But, specifically, the Court finds the defendants' decision to adopt and enforce a mandatory retirement policy for deputy sheriffs violated the Age Discrimination in Employment Act where the County failed to show that age is a bona fide occupational qualification by proving that, one, all or substantially all deputy sheriffs over the age of 55 are unable to perform safely and effectively the duties of the job, or that it is impossible or impracticable to determine job fitness on an individualized basis.

The Court has found that disability tends to increase with age. This didn't surprise me before I took the bench. It didn't surprise me when I served it other capacities. It didn't even surprise me when I was a Boy Scout. What is surprising is the County's attempt to justify an arbitrary cutoff of 55 years for the onset of all manners of degenerative conditions.

This is not supported by the evidence. It shows that some people over the age of 55, some people under the age of 55, cannot perform the job of Crawford County Deputy Sheriff. And the County did not show that all or substantially all those over 55 have such a disability.

The County has also failed to demonstrate the second prong of this test. And Mr. Hesslink has covered it and I suppose there is no reason for the Court to repeat it, except that it realizes there may be some dissatisfaction with this particular decision. And so, consequently, we will re-read, again, further statements which have been made in Orzel and in the other cases which it believes that are important.

Tests are available now and were also available in 1979 to determine fitness for service as Crawford County Deputy Sheriff. The tests are not expensive, are not impracticable and are far more fair and objective than the arbitrary cutoff of age 55.

And I remember that when I turned 40 I had to run that same two miles that the expert told us about; didn't do very well, so that's why I became a judge.

Furthermore, the County's arguing about reliance on state law cannot prevent their liability here in light of Orzel where judgments of the state and federal governments conflict as to the advisability of deputy sheriff's retirement at age 55, the federal statute must prevail under the supremacy clause.

And I guess I term this next argument hypocrisy. The defendants have shown at trial that Crawford County Deputy Sheriffs perform some similar tasks as United States Deputy Marshals. The Court, in its findings, has set forth those many similar tasks.

The defendants appear to argue that because Congress provided for mandatory retirement of the United States Deputy Marshals at 55—and that's a specific code section, 5 USC, Section 8335(b)—it could have not intended to deny the same prerogatives to states and municipalities under the Age Discrimination in Employment Act; and, therefore, the defendants would conclude Congress must have intended that age 55 is a legitimate bona fide occupational Qualification for deputy sheriffs.

I must go back to Orzel. In light of the last remarks which were made by counsel for the defendants, it would appear that there is the opinion held by those in which the Orzel decision would allow you to show certain items, certain similarities which would allow that BFOQ. I don't find it that way.

And, yes, I do believe it's perhaps been termed "hypocrisy"; but it isn't. The Court has made the determination as a legal matter mandatory retirement schemes approved by Congress for federal employees are not subject to the strict requirements of the ADEA. That's *Stewart v. Smith.* Rather, such schemes need only be rationally related to a permissible government ob-

jective. Only those age limitations that are so unreasonable as to constitute an arbitrary and capricious exercise of legislative power will fail this test. That's what Orzel tells me.

Now, under the ADEA, by contrast, compulsory retirement schemes must only be arguably rational; but must be reasonably necessary to the operation of the particular business in question. And it would appear that where the Court continues it indicated the Court applied an erroneous bona fide occupational qualification standard in requiring only that challenged policy be reasonable in light of safety factors rather than reasonably necessary to the efficient operation of the employr's business.

I think the Seventh Circuit says—and while the Court can appreciate the anomaly of the congressional policy—I think it's saying "do as I say, not as I do." And I believe that there is a much more stringent evidentiary test to establish the BFOQ in this instance than the rationality requirement imposed on federal retirement schemes. I think that Touy tells us that.

The Court has written many of these remarks because it would like to choose its words very carefully except when it comes to the matter of liquidated damages.

While I'm going to choose my words carefully, my notes, quite frankly, indicate that rather than this being a conscious discrimination, it appeared to be totally unconscious.

I decline to award liquidated damages. I put it very simply. The violations of the ADEA, as found by this Court, were not willful within the meaning of 29 USC 626.

The Court follows the direction of the Court of Appeals. And although Mr. Hesslink has quoted the *Syvock* decision, I looked at it a different way than perhaps you do, Mr. Hesslink. I looked to what Judge Pell wrote when he said, age discrimination—and these were some of the notes that I made from that decision at the time we were in trial—age discrimination resulting from unconscious stereotyping of an older person's abilities violates

the ADEA, although it may not have occurred with the state of mind necessary to a finding of willfulness.

Now Judge Pell supported this distinction between a violation of ADEA and a willful violation of the ADEA. And he referred to certain legislative history indicating that the legislative history of the ADEA suggests that the congressional framers thought that non-willful discrimination directed toward an individual was quite possible. Unlike race discrimination, age discrimination may simply arise from an unconscious application of stereotyped notions of ability rather than from a deliberate desire to remove older persons from the work force.

And I believe this is what occurred. The Crawford County Board saw a state legislature that adopted a policy with no more wisdom than did the Crawford County Board and decided that it's good enough for me, I think I ought to follow it.

Now age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. Those discriminations result in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older job seeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance.

And I think this last line should cover this whole case and every one that goes before it or after it. As a general rule, ability is ageless.

There are also remarks in that decision from Representative Burke that go on setting forth why this Court believes, and the Court, I believe should restate them, the standard for willfulness should focus on the defendants' state of mind at the time the allegedly discriminatory acts occurred. It must distinguish those situations in which an employer consciously discriminated against an employee because of age from those in which the discrimination is unconscious. This distinction is just

The County assumed, and really not unreasonably, that because of a legislative policy and because of, I suppose, a belief that the older you get, the less capable you get to perform certain tasks, they perhaps believe that age 55 could be a bona fide occupational qualification under the Age Discrimination in Employment Act.

I don't believe that this is a case where counsel, a defendant county, chose to ignore the clear impact of the federal law. Instead, the county, relying on the advice of competent counsel, adopted a resolution based on its interpretation of the law.

And now that this interpretation is now found to be incorrect, it doesn't require a determination that willful discrimination has occurred, although no law in effect at the time of plaintiffs, involuntary retirements required Crawford County to retire sheriffs at 55.

At no time did the parties participating in the hearing which was held by the Board of Supervisors, the defendant County, in April of 1979, including the plaintiffs and their union, advised the County of any change in the federal law which affected the retirement of these employees.

At no time prior to their retirement was the Defendant Crawford County made aware of any law which prohibited it from ordering the retirement of deputy sheriffs at age 55. And as Mr. Uelmen has pointed out to us in his argument, there was the opinion of the Attorney General of this State, issued in 1973, specifically advising cities and counties within the state of their right to compel employees to retire.

And although the defendants did know of the ADEA and its requirement, they erroneously assumed that age 55 was a bona fide occupational qualification for the Crawford County deputies.

And I realize there is a request for punitive damages. I can't in any way find how that would apply; and I decline to award liquidated damages an punitive damages.

Punitive damages could, of course, be awarded under 42 USC 1983; but the Court finds no evidence by which it may conclude that the defendants acted with malicious intent or that the defendants in some way aggravated the violation of the plaintiffs' rights; and that award would be totally inappropriate.

The Court has examined the exhibits which counsel has brought to its attention; specifically for the content of Exhibit 103 as it relates to Mr. Heiar, 99 as it relates to Mr. Brown and Kenneth Strauman as it relates to 101.

The Court will accept the lost salary figures which are contained for Wesley N. Heiar and which also are a part of the uncontested facts to the point where the defendants have indicated that were the plaintiffs to testify, this is to what they would testify.

And examining those exhibits and examining the apparent agreement as to the actual lost salary, that lost salary for Mr. Heiar was $46,893.48. From that there is to be deducted the interim earnings of $10,361.

I'm also deducting the retirement benefits which he received during that period of $5,020.14; awarding to Mr. Heiar $31,512.34.

An examination of the equitable powers of this Court would indicate that by taking the retirement benefits from him that he has received, we should also require that there be paid to him the sum of $9,739.08, which is the retirement share which would be paid by the County had he been employed. So there is a total award to Mr. Heiar in the amount of $41,251.42.

Similarly, the Court has accepted the actual lost salary which is found in Exhibit 99 and the stipulated statement of facts which indicates only on behalf of defendants that if plaintiffs were to testify they would testify as follows: there was lost salary in this matter of $44,436.73. Again, it's reduced by the interim earnings of $3,694.65, the retirement benefits that Mr. Brown received of $4,652.04.

And then the County's paid retirement share for Mr. Brown would have been the amount of $9,219.67. We took the benefits, we then add back in those which would have been paid by the County during this period of unemployment for a total of $45,309.71.

As it relates to Sergeant Strauman, again the Court accepts those figures which are set forth in Exhibit No. 101 in which this gentleman's lost earnings were in the amount of $51,219.57. He had interim earnings which are taken from him in the amount of $12,676.23 together with those retirements benefits which he received in the amount of $14,083.07.

To that the Court will add back in the County-paid retirement share during the period of his umemployment of $10,637.72; and award judgment in favor of Kenneth I. Strauman in his favor and against the County of Crawford in the amount of $35,097.99.

The Court does award judgment in those amounts specifically in favor of Mr. Heiar and against Crawford County in the amount of $41,251.42; Mryl Brown in his favor and against the County in the amount of $45,309.71, and has indicated in favor of Kenneth Strauman and against the County in the amount of $35,097.99.

The Court realizes that this very well may not be the end of the matter; and it does, of course, continue its supervising authority, as it does in all cases, because judgment will be entered and also a judgment of reinstatement that the three plaintiffs—the Court orders that they be reinstated. This is a further provision of the ADEA.

And, of course, without being any more specific than that, the Court would, of course, only review the matter of front pay in the event that something should occur in which the reinstatement cannot—in the event that that should occur. But reinstatement is ordered and the award as I have indicated.

I appreciate counsel's presentation and the tremendous amount of work and effort that you've done in this matter; and believe that all of the parties are not satisfied. I believe this is a just and common sense way of resolving this matter.

Thank you.

MR. UELMEN: Judge, may I ask you one question before you go?

THE COURT: Yes.

MR. UELMEN: On the reinstatement order, are you going to issue a formal order of some kind?

THE COURT: Yes, sir.

MR. UELMEN: I'm thinking about the practicalities of the matter. I mean, my client will ask me, are they supposed to report tomorrow morning or something.

THE COURT: The Court had thought of a number of ways in which this can be accomplished, as you have. I spent perhaps more time on the reinstatement because all I was given was the front pay argument which I'm rejecting at this time.

It would appear to me that arrangements should be made for the reinstatement within a period of 30 days. And that seems to be reasonable. A judgment will be entered to that effect.

Now in the meantime during that period there would then be compensation—

MR. UELMEN: Yes, Your Honor.

THE COURT: —for those employees during that period of time which would be in accord with this Court's award as it relates to the 1983 earnings.

But I would think that 30 days would be the reasonable time for that reinstatement. And I am happy you asked that question. I was hoping somebody would.

MR. HESSLINK: I was about to.

THE COURT: Well, there are those who, when we couldn't make that two mile run at 40, we also learned we don't volunteer much either.

So that will then be the suggestion and the order that will be incorporated. As of today judgment is entered.

* * *

(Whereupon, said proceedings were concluded at 6:40 p.m.)

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action File No. 82-C-273

WESLEY N. HEIAR, et al,
Plaintiffs,

vs.

CRAWFORD COUNTY, WISCONSIN, et al,
Defendant.

JUDGMENT ON DECISION BY THE COURT

This action came on for trial before the Court, Honorable John C. Shabaz, United States District Judge, presiding, and the issues having been duly tired and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be entered in favor of the defendant William Fillbach and Against the plaintiffs, Dismissing their complaint against him with prejudice and costs;

In favor of the plaintiff Wesley N. Heiar and against the defendant Crawford County for the amount of $41,251.42, together with costs;

In favor of the plaintiff Kenneth I. Strauman and against the defendant Crawford County for the amount of $35,097.99, together with costs;

In favor of the plaintiff Myrl E. Brown and against the defendant Crawford County for the amount of $45,309.71, together with costs;

In favor of said plaintiffs and against the defendant Crawford County for reinstatement of those positions which the plaintiffs held on the dates of their involuntary retirement, said reinstatement to be effective not later than May 13, 1983.

APPROVED AS TO FORM:

DATED THIS 21st DAY OF APRIL, 1983.

/s/ John C. Shabaz
District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 82-C-273-S

WESLEY N. HEIAR, KENNETH I. STRAUMAN,
and MYRL E. BROWN,
Plaintiffs,

v.

CRAWFORD COUNTY, WISCONSIN,
Defendant.

ORDER

Plaintiffs' motion to alter or amend judgment having been rescheduled before this Court and heard on May 27, 1983, the plaintiffs having appeared by DeWitt, Sundby, Huggett & Schumacher, by Robert M. Hesslink, Jr., and Jean G. Setterholm, and the defendant having appeared by Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, by David Leo Uelmen, the Honorable John C. Shabaz, District Judge, presiding;

The Court, having examined the affidavit of Philip N. Stephenson, Acting Director of Retirement and Survivor Benefits in the Wisconsin Department of Employee Trust Funds, furnished by plaintiffs, is of the opinion that plaintiffs' motion to amend the judgment previously entered in this matter should be granted.

The Court previously found that the plaintiff Wesley N. Heiar was entitled to back-pay in the amount of $46,893.48 less interim earnings in the amount of $10,361.00. In addition, he was granted his share of retirement contributions which would have been paid by Crawford County to the Wisconsin Retirement Fund during the period for which he was involuntarily terminated, less those retirement benefits which he received.

The back-pay for the plaintiff Kenneth I. Strauman was found to be in the amount of $51,219.57 less interim earnings in the amount of $12,676.23 for a net amount to be paid Kenneth I. Strauman of $38,543.34.

Similar findings were made concerning Myrl E. Brown whose back-pay was found to be in the amount of $44,436.73 less interim earnings in the amount of $3,694.65 for a net amount of $40,742.08.

As with the defendant Heiar, the awards to Brown and Strauman were similarly adjusted to reflect those contributions which would have been made by the County to the fund less benefits received.

The Court in awarding to each plaintiff the County's share of retirement contributions which would have been paid to the retirement fund during the interim was attempting to grant such "legal or equitable relief as may be appropriate to effectuate the purposes of the Act." In so doing it further reduced these amounts by the retirement benefits which it believed the plaintiffs had received during the period of their involuntary termination.

It now readily appears that the Court was attempting to be too precise. Without previous guidance or assistance from counsel, until now, this Court was of the opinion that its entry into the field of retirement benefits and contributions was necessary in order to provide the plaintiffs with that award to which they were entitled.

The affidavit of Philip N. Stephenson clearly indicates that it is not necessary for this Court to allocate retirement contributions or benefits between the parties nor to enter an award concerning them. The appropriate Wisconsin statutes direct that Crawford County pay to the Wisconsin Retirement Fund the contributions which it would have been required to make had the plaintiffs been employed. The appropriate statutory provi-

sions also require that the retirement benefits received by the plaintiffs be returned to the fund.

Clearly, it would be inequitable for this Court to award to the plaintiffs the dollar amounts which the County will be required to pay to the retirement fund on their behalf. Conversely, it would be inappropriate to require the plaintiffs to have deducted from their awards the retirement benefits which they have received during the interim where the statutes provide that those amounts shall be repaid to the fund. Accordingly, the judgment shall be appropriately amended as follows:

IT IS ORDERED that judgment be entered in favor of the plaintiff Wesley N. Heiar and against the defendant Crawford County in the amount of $36,532.48, together with his costs and disbursements of the action.

IT IS FURTHER ORDERED that judgment be entered in favor of the plaintiff Kenneth I. Strauman and against the defendant Crawford County in the amount of $38,543.34, together with his costs and disbursements of the action.

IT IS FURTHER ORDERED that judgment be entered in favor of the plaintiff Myrl E. Brown and against the defendant Crawford County in the amount of $40,742.08, together with his costs and disbursements of the action.

Entered this 2nd day of June, 1983.

BY THE COURT:

/s/ JOHN C. SHABAZ
District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action File No. 82-C-273

WESLEY N. HEIAR, KENNETH I. STRAUMAN,
and MYRL E. BROWN,
Plaintiffs,

vs.

CRAWFORD COUNTY, WISCONSIN,
Defendant.

AMENDED JUDGMENT

This action came on for (hearing) before the Court, Honorable John C. Shabaz, United States District Judge, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be entered in favor of the plaintiff Wesley N. Heiar and against the defendant Crawford County in the amount of $36,532.48, together with his costs and disbursements of the action.

It is Further Ordered that judgment be entered in favor of the plaintiff Kenneth I. Strauman and against the defendant Crawford County in the amount of $38,543.34, together with his costs and disbursements of the action.

It is further ordered that judgment be entered in favor of the plaintiff Myrl E. Brown and against the defendant Crawford County in the amount of $40,742.08, together with his costs and disbursements of the action.

All other provisions of Judgment entered 4/21/83 remain without change.

Approved as to form this 7th day of June, 1983.

/s/ John C. Shabaz
District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-C-273-S

Wesley N. Heiar, Kenneth I.
Strauman, and Myrl E. Brown,
Plaintiffs,

v.

Crawford County, Wisconsin,
Defendant.

ORDER

This case is now before the Court on the motion of plaintiffs Wesley N. Heiar, Kenneth I. Strauman, and Myrl E. Brown for an award of attorney's fees in the amount of $56,730.10 and reasonable disbursements in the amount of $10,673.89 pursuant to FLSA 29 U.S.C. §216(b) and ADEA 29 U.S.C. §626(b). Plaintiffs' motion to amend dated August 11, 1983 requests an award for fees and disbursements in the total amount of $66,995.78, which includes fees for the preparation of the original petition for fees and the recognition of an error in its original computation.

The Court is of the opinion that plaintiffs, as prevailing parties, are entitled to reasonable attorney's fees and costs of the action, to be paid by the defendant Crawford County. The Clerk of this Court has already taxed those costs which are allowed. Accordingly, the Court will address itself only to the award of reasonable attorney's fees.

At the outset, the Court disallows all further requests for disbursements, believing the appropriate costs contemplated by 28 U.S.C. §1920 have been awarded by the Clerk in the amount of $1,320.98.

As this Court has enunciated on previous occasions, until Congress expresses a clear intention that the prevailing party shall be compensated for the work of law clerks, it will not expand upon "reasonable attorney's fees," believing the time of a clerk is inherently included as a part of the fee, as is the cost of rent, telephone, postage, travel, and those other items of overhead which these plaintiffs appear to demand in the form of disbursements.

This case, in which plaintiffs prevailed against Crawford County on their claims of age discrimination, was tried before the Court in three days, April 4, 5 and 6, 1983. For their successful efforts, plaintiffs' attorneys have submitted documentation indicating the expenditure of 897.82 hours, requesting fees of $58,437.70, amounting to $65.00 per hour.

The Court is amazed at the enormity of the award requested. Although it has no evidence to doubt the number of hours expended, it is of the opinion that those hours were either not all spent on the successful claim, or were not reasonably necessary to have been so expended.

For example, from those hours designated, plaintiffs' attorneys expended 35.15 hours on this case on March 21, 1983; 23.40 hours on March 29, 1983; 20.75 hours on March 30, 1983; and 20.65 hours on March 31, 1983. The Court would prefer to believe that this time was spent upon certain claims where plaintiffs failed to prevail, rather than a squandering of time, to include duplication of effort and needless research and preparation. As it has in prior matters, the Court follows the guidelines in *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974). *Waters* held that "hours spent times billing rate," upon which plaintiffs rely, is only "a convenient starting point from which adjustment can be made for various other elements." Those elements are:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

As to the first factor, the Court must consider that only the claims of the plaintiffs against Crawford County were successful. As originally commenced, the action pursued not only Crawford County, but its Sheriff and eleven members of the Crawford County Board, on causes of action outside the Age Discrimination Employment Act, upon which the plaintiffs ultimately prevailed. The plaintiffs failed to prevail against the other defendants, and the Court must assume that from the enormity of those hours expended, a substantial portion thereof must be attributed to those other claims upon which the plaintiffs did not prevail. As to the first element, the Court also refers to the novelty and difficulty of the questions involved. Certainly, at one time a case of this nature did, indeed, have some novelty; however, since the decision of *Orzel v. Wauwatosa,* 697 F.2d 743 (1983), that novelty has been substantially diminished.

As to the second factor, plaintiffs' counsel claims to have turned down other work in order to further their representation of plaintiffs. Again, had plaintiffs been successful against those

other defendants named, this Court would be persuaded to a greater degree than it is at this point. It would also appear that those clients turned away were, for the most part, represented by other members of the firm of which plaintiffs' counsel are members.

The Court does, indeed, believe that $65.00 per hour is reasonable; however, it does have difficulty in believing that the customary rate for litigating an age discrimination case is in excess of $58,000.00.

There is no question that as to the fourth factor the plaintiffs were successful as to the amount and results obtained.

As to the fifth factor, the Court is of the opinion that it has been previously discussed in those other factors which herein appear.

As to the sixth factor, it would appear that the professional relationship is based upon this matter only, plaintiffs having been referred to the firm in which counsel are members for that recognized expertise which is attributed to them.

The plaintiffs were well counseled in turning to the attorneys who have represented them so well. This is a law firm which has the experience, reputation and ability to perform with excellence those services for which they have been retained.

Finally, as to the eighth factor, the Court is aware of the contingency fee arrangement which existed between the plaintiffs and their attorneys, and does not find that the one-third arrangement is unreasonable. It should not, however, be the dollar criterion followed by this Court in awarding a fee. The Court is also aware of the maximum amount of $5,000.00 which would have been paid plaintiffs' attorneys in the event they had not been successful.

From its examination of all of these factors, and upon its experience with the proceedings and those others which are

analogous, 50% of the fee requested is appropriate. As previously indicated, the plaintiffs prevailed against one defendant rather than the thirteen which were originally named. The pursuit of a multitude of ill-founded claims against defendants who from the outset should not have been named, merely translates into excessive litigation, for which plaintiffs' attorneys should not be compensated. The case was tried in a period of three days. It is difficult for this Court to determine the work which was performed by the attorneys on those issues where they ultimately prevailed. It is just as difficult to determine the excessive and duplicative preparation which may have been provided. The Court believes, however, that 50% of the work performed must be attributed to those other areas to which this Court has referred.

It may be that the enormity of the award will be eventually approved. That generosity, however, cannot be provided by this Court. Therefore, an award of attorney fees will be granted, and the defendant will be assessed $29,217.35 of those fees requested. This amount is that which this Court believes to be "reasonable attorney's fees."

ORDER

IT IS ORDERED that plaintiffs' motion for an award of attorney's fees is GRANTED in part. Defendant shall be assessed $29,217.35 of those plaintiffs' attorney's fees requested.

Entered this 26th day of October, 1983.

BY THE COURT:

/s/ JOHN C. SHABAZ
District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

Civil Action Docket No. 82-C-273-S

Wesley N. Heiar, et al
Plaintiffs,

vs.

Crawford County, Wisconsin,
Defendant.

JUDGMENT

This action came on for consideration before the court, United States District Judge John C. Shabaz presiding. The issues having been duly considered, and a decision having been duly rendered, it is ordered and adjudged.....that plaintiffs' motion for an award of attorney's fees is Granted in part. Defendant shall be assessed $29,217.35 of those plaintiffs' attorney's fees requested.

Dated at: Madison, Wisconsin *Date:* October 27, 1983

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-C-273-S

Wesley N. Heiar, Kenneth I.
Strauman, and Myrl E. Brown,
Plaintiffs,

v.

Crawford County, Wisconsin,
Defendant.

ORDER

Motion of defendant to stay execution on the judgment for attorney's fees entered by the Court on October 27, 1983 and to amend the judgment entered in said matter to include said amount having come on to be heard before the Court on December 5, 1983, the plaintiffs having appeared by DeWitt, Sundby, Huggett & Schumacher, by Robert M. Hesslink, Jr., and the defendant having appeared by Goldberg, Previant, Uelman, Gratz, Miller & Brueggeman, by David Leo Uelmen, the Hon. John C. Shabaz, District Judge, presiding,

ORDER

IT IS ORDERED that motion of defendant to amend judgment and stay execution thereon is GRANTED.

Entered this 5th day of December, 1983.

BY THE COURT:

/s/ JOHN C. SHABAZ
District Judge

APPENDIX K

Opinion by Judge Posner

Judge Gibson dissenting

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

August 20, 1984

Before

Hon. Richard A. Posner, Circuit Judge

Hon. John L. Coffey, Circuit Judge

Hon. Floyd R. Gibson, Senior Circuit Judge*

Wesley N. Heiar, Kenneth I. Strauman
and Myrle E. Brown,
Plaintiffs-Appellees, Cross-Appellants,

Nos. 83-1872, 83-2149, 83-2166, 83-3139 vs.

Crawford County, Wisconsin,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States
District Court for the Western
District of Wisconsin.

No. 82 C 273

Judge John C. Shabaz

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* The Honorable Floyd R. Gibson of the Eighth Circuit, sitting by designation.

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED IN PART, and REMANDED IN PART, with no costs awarded in this court, in accordance with the opinion of this Court filed this date.

APPENDIX L

Relevant Excerpts From Federal and State Statutes

Federal Statutes

Age Discrimination In Employment Act

(As Amended 1978)

Title 29 USC

§ 623. Prohibition of age discrimination

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee

benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

* * *

29 USC

§ 626. Recordkeeping, investigation, and enforcement

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter:

* * * * *

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

29 U.S.C. § 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Portal - To - Portal Act

29 U.S.C. § 255

"Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Basoc-Davis Act—

(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued".

5 U.S.C. § 8335

* * *

(b) a law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

* * *

WISCONSIN STATUTES 1977

CHAPTER 41

PUBLIC EMPLOYES RETIREMENT

(EXCEPT TEACHERS)

* * *

41.02 Definitions. In this subchapter:

(11) (a) "Protective occupation participant" means any participant whose principal duties involve active law enforcement or active fire suppression or prevention provided such duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning. This definition is deemed to include any participant whose name is certified to the fund as provided in par. (d) and who is a conservation warden, conservation patrol boat captain, conservation patrol boat engineer, conservation pilot, conservation patrolman, forest fire control assistant, member of the state patrol, state motor vehicle inspector (if hired prior to January 1, 1968), policeman, including the chief and all other officers, fireman, including the chief and all other officers, sheriff, undersheriff, deputy sheriff, county traffic policeman, state forest ranger, fire watchman employed by the Wisconsin veterans home, or who is determined by his participating employer (or by his department head in the case of a state employe) to meet the qualifications set forth in this paragraph.

* * *

(23) "Normal retirement date" means the day on which a participant attains the age of 60 years if he or she is or was a protective occupation participant; * * * but after June 30, 1974, normal retirement date for each protective occupation participant means the day on which the participant attains the age of 55 years. * * *"

* * *

41.11 Compulsory retirement; annuities.

(1) COMPULSORY RETIREMENT. Any participating employe, except an officer elected by the vote of the people, who has reached his normal retirement date on the effective date for his employer shall be retired at the end of his first calendar quarter year as a participating employe and any participating employe, except an officer elected by the vote of the people, who reaches his normal retirement date shall be retired at the end of the calendar quarter year in which such date occurs, unless, in either case, his employment is continued by his employer or appointing authority.

111.32

(e) The prohibition against discrimination because of age shall not apply to hazardous occupations including, without limitation because of enumeration, law enforcement or fire fighting.

APPENDIX M

29 CFR Section 1625.6(b), the EEOC's Interpretations of the ADEA, states:

> An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

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No. 84-948 (2)

In The
Supreme Court of the United States
October Term, 1984

CRAWFORD COUNTY, WISCONSIN,
Petitioner,

v.

WESLEY N. HEIAR, KENNETH I. STRAUMAN and MYRL E. BROWN,
Respondents.

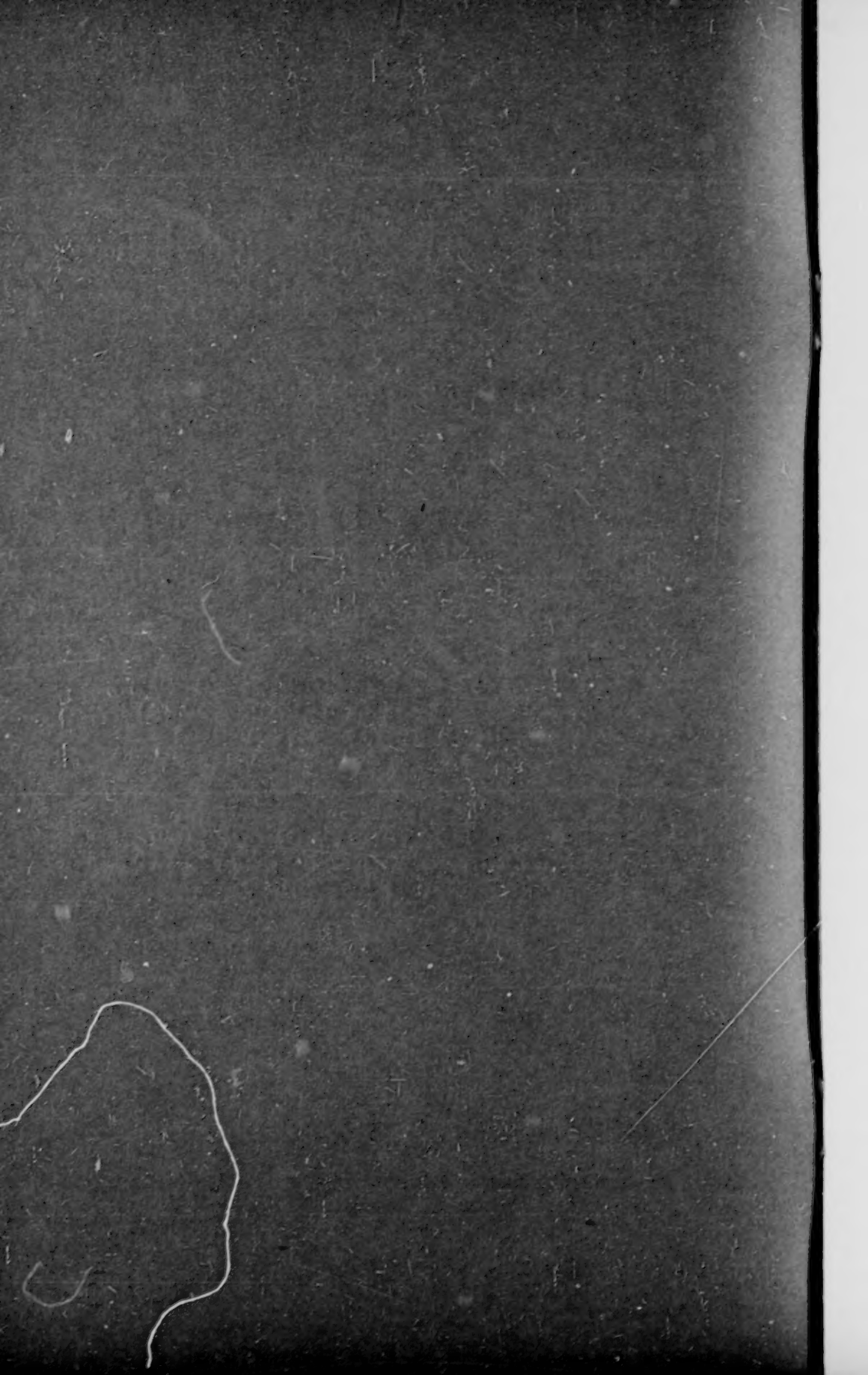
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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January 11, 1985

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QUESTIONS PRESENTED

1. Does a municipality satisfy its burden of establishing that age 55 is a bona fide occupational qualification for law enforcement personnel who do not have 20 years of service by showing that those employees have some duties in common with federal law enforcement officers who can be retired at age 55 if they do have 20 years of service?

2. Did the circuit court err in giving deference to the BFOQ test set forth in the EEOC Guidelines?

3. Is the State of Wisconsin a deferral state so as to trigger the 300-day charge filing requirement?

4. Did the circuit court abuse its discretion in refusing to entertain a statute of limitations argument not pursued before the district court?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the petitioner, Crawford County, and the respondents, Wesley N. Heiar, Kenneth I. Strauman and Myrl E. Brown.

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No. 84-948

In The

Supreme Court of the United States

October Term, 1984

CRAWFORD COUNTY, WISCONSIN,

Petitioner,

v.

WESLEY N. HEIAR, KENNETH I. STRAUMAN and MYRL E. BROWN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

STATEMENT OF THE CASE

This is a petition for certiorari seeking review of a circuit court decision upholding a district court decision

that the mandatory retirement of three local law enforcement officers violated the ADEA.

On December 3, 1979, Respondents Wesley Heiar and Kenneth Strauman filed charges of age discrimination with the Equal Employment Opportunity Commission (EEOC). (Pet. App. 39-40) Myrl Brown, the other respondent, filed a complaint of age discrimination with the EEOC on December 7, 1979. (Pet. App. 40) These charges contended that their mandatory retirements earlier that year violated the Age Discrimination in Employment Act (ADEA). Heiar, Strauman and Brown were involuntarily retired in June and September, 1979, from their Crawford County positions of patrolman, sergeant of traffic, and sergeant of radio and jailer, respectively. (Resp. App. 2A)

In December, 1979, all three respondents also filed charges of age discrimination with the Wisconsin Equal Rights Division. (Resp. App. 3A-4A) The Equal Rights Division rejected the respondents' claims "because Wisconsin's Fair Employment Law does not cover age discrimination against any hazardous type occupation such as law enforcement or fire fighting." (Resp. App. 4A) Conciliation was undertaken by the EEOC. (Resp. App. 4A) On March 18, 1982, all respondents were notified that EEOC's attempted conciliation had been unsuccessful. (Resp. App. 4A)

An action for equitable relief and damages under the ADEA was commenced in federal district court on April 16, 1982. (R. 1 Summons and Complt.) The petitioner, Crawford County, is a municipal corporation of the State

of Wisconsin and the former employer of the respondents. (Pet. App. 30)

The petitioner had asserted numerous affirmative defenses to the respondents' claims. Two of those defenses now form the basis of its petition for certiorari; a general allegation that the claim is barred by the statute of limitations and an allegation that being less than age 55 was a bona fide occupational qualification. (R. 7, pp. 9 & 10)

Under the trial court's pretrial procedures, the parties prepared a joint pretrial report and each prepared its proposed findings of fact and conclusions of law. (R. 43, 44 and 46) These proposed findings were to contain all of the issues upon which each party requested the court to rule. The petitioner's proposed findings did not contain the necessary proposed findings to support a two year statute of limitations defense. Its trial brief was also silent with respect to this issue. (R. 45)

The sole statute of limitations issue raised by the petitioner prior to trial was the petitioner's statute of limitations defense based on 29 U.S.C. § 626, the 180-day filing requirement with the Equal Employment Opportunity Commission. The district court, therefore, made no finding with respect to the two-year statute of limitations defense. (Pet. App. 28-41)

Trial to the court was held on April 4, 5 and 6, 1983. Following final arguments on April 13, 1983, the district court rendered a bench decision. (Pet. App. 44-65) The district court found in favor of all three respondents and ordered backpay and reinstatement. (Pet. App. p. 41) On April 15, 1983, the district court rendered its written Findings of Fact and Order for Judgment. (Pet. App. 28-41)

Judgment was entered in favor of respondents on April 21, 1983. (Pet. App. 66-67) On respondents' motion, an Amended Judgment for respondents was entered on June 9, 1983. (Pet. App. 68-71) Petitioner filed notices of appeal from the original and Amended Judgments. (R. 56, R. 66) The Court of Appeals affirmed the decision of the district court on these issues. (Pet. App. 1-27, 79-80)

In June, 1977, the law enforcement committee of the Crawford County Board adopted a motion requiring compulsory retirement of all law enforcement employees at age 55. Heiar, who was age 54, appeared at that meeting and requested an extension past his 55th birthday. The Committee refused to change the policy, but granted Heiar an extension of his retirement on a month-to-month basis. (R. 85, Tr. I, pp. 70-72)

ADEA was amended in April 1978 to prohibit mandatory retirement pursuant to employee benefit or pension plans. The law enforcement committee of the Crawford County Board of Supervisors, voted at its April, 1979 meeting to submit to the County Board a resolution requiring mandatory retirement at age 55 for all sheriff's deputies without exception. (R. 82, Tr. II, pp. 281-282) On April 17, 1979, the County Board at its annual session considered and adopted that resolution. (R. 82, Tr. II, p. 282)

At the times of their retirements, Strauman and Brown were 55 years old. Heiar was 56. None of them had accumulated 20 years of law enforcement service so as to qualify for full retirement benefits. (Resp. App. 2A)

Respondents, at all times, up to and including their mandatory retirements, satisfactorily performed their du-

ties as deputy sheriffs. (Resp. App. 3A) The trial court found all three respondents to be physically qualified to return to their jobs at the time of trial. (Pet. App. 36)

Crawford County did not have an ongoing physical fitness program for any of its deputy sheriffs. (Resp. App. 3A) Prior to the decision to compel retirement, petitioner did not request a medical evaluation to determine the respondents' fitness to retain their jobs. Crawford County has never required any incumbent deputy sheriff to pass a regular fitness test or medical examination in order to retain their jobs. (Resp. App. 3A) The County had not, and has not, conducted any studies to determine whether age, or being age 55, affects performance of deputy sheriff duties. (R. 82, Tr. II, pp. 273-292 and 323-352.)

Crawford County had never considered physical endurance, strength, and agility to be a major requirement of the job of deputy sheriff. In fact, the County employed, as part of a small department, a jailer with one leg, a deputy with diabetes and a chief deputy who weighs over 300 pounds. (Resp. App. 10A-12A)

SUMMARY OF ARGUMENT

Certiorari should not be granted in this case because the reasons stated in the petition do not meet the standards set forth in Supreme Court Rule 17.

The petition does not demonstrate that there is a conflict among the circuit courts on the question of the

weight to be given federal retirement provisions when evaluating a bona fide occupational requirement which requires resolution by this Court. In fact, the facts of this case do not support a finding in favor of the petitioner, even on the rationale applied by the Court of Appeals for the Fourth Circuit in *Johnson v. Mayor and City of Baltimore,* 731 F.2d 209 (4th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3291 (U.S. Sept. 27, 1984, No. 84-518) and 53 U.S.L.W. 3405 (U.S. Nov. 2, 1984, No. 84-710).

There is no inconsistency whatsoever among the circuit courts on how a BFOQ is to be determined in a law enforcement setting. All circuits have required the employer to factually establish at trial the BFOQ criteria set forth in the EEOC Guidelines and *Usery v. Tamiami Trail Tours, Inc.,* 531 F.2d 224 (5th Cir. 1976). Those decisions, and this decision, are in accord with this Court's prior, and recent, holding on the same point in *EEOC v. Wyoming,* 460 U.S. 226 (1983). Therefore, this Court need not exercise its discretion to grant the writ in order to resolve a conflict among the circuits on this issue.

It would also be inappropriate for this Court to grant the writ in order to address the petitioner's statute of limitations arguments. Petitioner cites no decisions of this Court, or any other circuit court, which conflict with the decision below on the 180/300 day statute of limitations question. In addition, the decision of the court below was based on that court's interpretation of state, not federal, law.

The petitioner acknowledges that it abandoned its two year statute of limitations defense at the trial court level, if indeed it ever raised it. The general rule is that

a circuit court is not required to consider such a defense for the first time on appeal. Since the decision by the court below fits well within that general rule, no review by this Court is necessary or appropriate.

ARGUMENT

The factors which this Court will consider in determining whether to grant a petition for certiorari are contained in Rule 17. That section provides, in relevant part, that the Court will consider a petition for certiorari in the following circumstances:

> "RULE 17. Considerations governing review on certiorari.
>
> • • • •
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> • • • •
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

The petitioner proposed three issues for review by this Court. First, the petitioner argues that there is a

conflict among the circuits on the question of the weight to be accorded to the federal retirement age in determining a BFOQ for local government employees performing similar functions. Secondly, the petitioner contends that the question of whether Wisconsin is a "deferral state" within the meaning of this case presents a novel question of federal law. Finally, the petitioner argues that the circuit court abused its discretion in not allowing petitioner to revive a statute of limitations defense it had abandoned in the trial court.

For the reasons which follow, none of these arguments would merit intervention by this Court.

I. THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OR THIS COURT.

We contend that this Court need not review the decision below on the BFOQ for two reasons. First of all, despite petitioner's assertions to the contrary, the decision below was fully in accord with this Court's prior holdings and the holdings of other courts. It is also in accord with the criteria applied by other courts in determining the existence of a BFOQ defense. See, for example, *Mahoney v. Trabucco,* 738 F.2d 35 (1st Cir. 1984); *EEOC v. County of Los Angeles,* 706 F.2d 1039, cert. denied, — U.S. —, 104 S.Ct. 984 (9th Cir. 1984); *Tuohy v. Ford Motor Company,* 675 F.2d 842 (6th Cir. 1982); and, *EEOC v. Commonwealth of Pennsylvania,* — F. Supp. —, 36 F.E.P. Cases 234 (D.C.M.D. Penn. 1984). Other courts which have addressed the issue have uniformly required municipal employees to establish the criteria set

forth in the EEOC guidelines, 29 C.F.R. § 1625.6 (b). This decision of the court below is thus in accord with the prevailing view among the circuit courts.

Secondly, this case is readily distinguishable from the case upon which the petitioner primarily relies, *Johnson v. Mayor and City of Baltimore,* 731 F.2d 209 (4th Cir. 1984).

A. The Decision Of The Court Below Is Fully In Accord With The Standards Previously Set Forth By This Court.

In its petition, Crawford County contends that this Court left open in *Wyoming, supra,* the question of whether 5 U.S.C. § 8335 (b) precludes the application of normal ADEA standards to state protective services employees. (Petition at pp. 7-8) That represents an extremely myopic view of the *Wyoming* decision. In fact, in reaching its decision in *Wyoming,* this Court specifically addressed the issue which the petition now seeks to again place before it.

Petitioner cites this Court's statement at 460 U.S. 240 that "the state's discretion . . . is merely being tested against a reasonable federal standard" as implying that this Court intended that the "reasonable federal standard" be the retirement age for federal law enforcement officers. In fact, the "reasonable federal standard" referred to by the Court was the standard at issue in that case, i.e., the ADEA. This view is further supported by other language in the Court's opinion.

In *EEOC v. Wyoming,* 460 U.S. 226, 239 (1983), this Court, in finding that the ADEA did not violate the Tenth

Amendment, and in further explaining its implications on state and local government employment hiring practices, noted that:

> "[T]he Act requires the State to achieve its goals *in a more individualized* and careful *manner* than would otherwise be the case, ..." (Emphasis added)

The individualized approach, rather than the use of age as a blanket criteria for making employment decisions, is the heart and soul of what the ADEA mandates. The stereotyping of older employees as being less capable is exactly the evil which the ADEA was enacted to preclude. Thus, the language in this Court's opinion belies any inference that the court intended to apply a nationwide standard of retirement age for wholesale classes of employees.

This Court in *Wyoming* specifically rejected the idea that the ADEA's thrust was somehow modified by federal retirement statutes. In reaching that conclusion, this Court specifically stated that:

> "We note, incidentally, that the strength of the federal interest underlying the Act is not negated by the fact that the Federal Government happens to impose mandatory retirement on a small class of its own workers. . . . Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that determination. . . ." 460 U.S. at p. 243, n. 17.

Our view is further supported by the fact that this Court has also held that the standards applicable to the employment practices of public employers are the same as those which are utilized by courts when evaluating the

employment practices of private employers. See, *Dothard v. Rawlinson,* 433 U.S. 321 (1977).

The petition sets forth, as one of its grounds for review, the fact that the circuit court relied upon the two-prong BFOQ test set out in the EEOC regulations at 29 C.F.R. § 1625.6 (b). Rather than being a basis for review, the fact that the Guidelines were followed is the best indication this Court can have that the decision below is correct. The use of the EEOC guidelines has been specifically approved, both by this Court, and the court below in previous cases. In *Griggs v. Duke Power Company,* 401 U.S. 424, 433-434 (1971), this Court specifically approved, and mandated, use of the EEOC guidelines, stating, "The administrative interpretation of the Act by the enforcing agency is entitled to great deference."

The court below has also previously concluded that the EEOC guidelines are entitled to a presumption of validity. See, *United States v. City of Chicago,* 549 F.2d 415, 430 (7th Cir. 1977). Consistent with this Court's holding in *Griggs,* that court concluded that:

> "Compliance with these Guidelines is generally required absent some showing that a cogent reason exists for noncompliance." 549 F.2d at p. 430.

Thus, the decision below is fully in accord with the principles previously developed and applied by this Court. There is therefore no need for this Court to direct its limited resources towards its review.

B. This Case Is Readily Distinguishable From The Baltimore Case.

In *Johnson v. Mayor and City of Baltimore, supra,* the Court of Appeals for the Fourth Circuit concluded

that the City of Baltimore was entitled to retire its firefighters at age 55 because federal law permitted federal firefighters to be retired at age 55 in certain circumstances. That decision, however, is distinguishable from this case in at least two respects.

The petitioner has also cited a recent decision by the Eighth Circuit Court of Appeals in *EEOC v. Missouri State Highway Patrol,* — F.2d —, 36 F.E.P. Cases 401 (8th Cir. 1984) as reaching a similar conclusion. The *Missouri State Highway Patrol* decision was not based, however, on the same rationale as *Baltimore.* Rather, the court in the *Missouri State Highway Patrol* case based its decision on the extensive evidence which had been introduced by the employer in support of its BFOQ defense.

> "[T]he Patrol has established that there is a factual basis for believing that substantially all Patrol members over the age of 60 lack sufficient aerobic capacity to perform their duties safely and efficiently. The Patrol also has established the inefficacy of testing, as an alternative to age, as a means of distinguishing among the individuals over 60." 36 F.E.P. Cases at p. 407.

The court in *Missouri State Highway Patrol* applied the EEOC test, the same test generally accepted by all the circuits, and the court below, for establishing a BFOQ defense. See, *Usery v. Tamiami Trail Tours, Inc., supra,* and *Orzel v. City of Wauwatosa,* 697 F.2d 743, cert. denied, — U.S. —, 78 L.Ed. 2d 680 (7th Cir. 1983). This is the very same test which the court below applied to this case and found, quite correctly, that the petitioner's evidence failed to meet. The petitioner does not even argue that its evidence would meet the *Tamiami* test and EEOC Guidelines.

While the court in *Missouri State Highway Patrol* did mention the federal retirement age of 55 for law enforcement personnel, in passing, as additional support for its conclusion that the highway patrol had carried its burden in establishing a BFOQ, it hardly based its conclusion on that basis. Indeed, the court could not have rested its decision on that basis since the retirement age it was upholding was 60, not 55. Thus, the only court which has applied a federal retirement age to a nonfederal employee was the Fourth Circuit Court of Appeals in the *Baltimore* case.

In *Baltimore,* the Fourth Circuit concluded that, because firefighters at the local level perform substantially identical duties to federal firefighters, Congress must have intended to make the federal retirement for federal firefighters applicable to municipalities when it extended the ADEA to local units of government. Even assuming *arguendo* that this decision is even arguably correct, and in light of footnote 17 to this Court's decision in *Wyoming* we do not think that it is, the decision of the court below in this case is readily distinguishable.

We note first that the trial court below did not make the findings necessary to support a BFOQ finding even under the *Baltimore* rationale. That court did not find that the duties of Crawford County deputy sheriffs were substantially identical to those of the federal law enforcement officers to whom the petitioner wishes to draw a parallel. The court merely concluded, as part of its findings, that:

> "55. The duties performed by United States Deputy Marshalls are similar *in many respects* to the duties

performed by the deputy sheriffs in various counties of Wisconsin, including Crawford County. . . .

56. *Some* duties performed by FBI agents are similar to those law enforcement duties performed by deputy sheriffs in Wisconsin counties, including Crawford County." (Pet. App. 36-37) (Emphasis added)

In fact, the record below clearly established that the majority of duties performed by Crawford County deputy sheriffs in general, and by these respondents in particular, were traffic patrol and radio dispatch functions not performed at all by either United States marshals or FBI agents. (Resp. App. 6A-8A) Thus, any attempt to establish a parallel between the duties performed by these local law enforcement officers and those performed by federal law enforcement officers must necessarily fail, at least on the record made in this case. While the court in *Baltimore* may have concluded that the duties involved in fighting fires at all levels of government are substantially identical, the duties involved in law enforcement at varying levels of government are not.

Secondly, the record in this case clearly establishes that, even if the three respondents in this case had been federal law enforcement personnel, they would not have been subject to mandatory retirement. For, not all federal law enforcement officers are required to retire at age 55. Those officers who do not have 20 years of federal service are not required to be separated from service until they reach either 20 years of service of 60 years of age. See, 5 U.S.C. § 8335 (b), incorporating by reference § 8336 (c). In the instant case, none of the respondents had achieved 20 years of service or the age of 60 at the time of their retirement. (Resp. App. 2A)

It follows that, even assuming *arguendo* that 5 U.S.C. § 8335 (b) was incorporated wholesale into the ADEA,

Crawford County would still not have been permitted to mandatorily retire these three employees. This factual difficulty with the petitioner's position renders the entire issue, of a conflict with the *Baltimore* decision, academic.

II. THE CIRCUIT COURT'S DECISION THAT THE CLAIMS ARE NOT BARRED BY THE 180-DAY STATUTE OF LIMITATIONS DOES NOT WARRANT REVIEW.

29 U.S.C. § 626 provides that no action on an ADEA claim may be commenced until 60 days after the filing of a charge with the EEOC. That charge must be filed within 180 days after the alleged unlawful practice occurred or, in deferral states, within 300 days after the alleged unlawful practice occurred.

All respondents filed their charges within 300 days of the dates on which they received even the earliest information that they were to be retired.[1] The court below held that Wisconsin is a deferral state, and hence, the 300-day limitation period applies.

There are two reasons why the court below held that the exemption contained in the Wisconsin statute for hazardous occupations did not preclude the state from being a deferral state in this instance. First, the statute, on its face, did not preclude the filing of charges with the state agency in this case. Secondly, the statute in question

---

[1] This is not to say that the respondents agree that the rationale in *Delaware State College v. Ricks,* 449 U.S. 250 (1980) and *Chardon v. Fernandez,* 454 U.S. 6 (1981) are applicable on the facts of this case. However, since the petition is addressed to the deferral state issue, we limit our response to that question.

had never been construed by the Wisconsin courts, nor had its validity, under state law, ever been determined. Thus, it was impossible for the respondents to ascertain whether or not the discrimination alleged was prohibited by Wisconsin law. That decision is in accordance with previous decisions of this Court and is premised upon a determination of state, not federal law. Hence, review by this Court would not be appropriate.

A. The Decision Below Is In Accord With Prior Decisions Of This Court.

Congress, in adopting the employment discrimination statutes made clear that it did not intend the federal law to supersede the authority of the individual states to control age discrimination. *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980). Thus, § 14 (b) of the ADEA provides, in those states having a statute prohibiting age discrimination in employment and a state agency empowered to grant relief [deferral states], that no federal suit may be brought until 60 days after proceedings have been commenced under state law, unless the state proceeding has been earlier terminated.

In *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979), this Court held that:

> "It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State

does not provide prompt or complete relief . . . " 447 U.S. at p.65.

Thus, in a deferral state the statute of limitations is not only longer, but a prospective plaintiff is also *required* to initiate his claims with the state agency.

Wisconsin has adopted a statute prohibiting discrimination in employment because of age. See Wis. Stat. § 111.31, *et seq.* Wisconsin has also empowered the Equal Rights Division to enforce the provisions of this Act. Wis. Stat. §§ 111.33 and 111.36. Therefore, since Wisconsin meets the facial statutory criteria for a deferral state, respondents were subject to both the additional requirement that they initiate action with the state agency and the longer 300-day charge filing requirement of § 7(d) (2). The respondents have complied with both of these requirements. The court below so held.

Petitioner argues, however, that because the Wisconsin statute does not provide relief in each and every instance in which relief would be available under federal law, Wisconsin is not a deferral state. It cites no authority for this proposition. In analogous situations, this Court and other courts have found that claimants must file their claims with the applicable state agency before they can pursue their federal claims even where no relief could be expected from the state agency.

This Court has previously held that a complainant, in a deferral state, need only file the complaint with the state agency. *Oscar Mayer, supra.* There is no further requirement that the matter be pursued further by either the agency or the individual claimant. In reaching that conclusion, this Court reasoned as follows:

> "By its terms, then, the section requires only that state proceedings be commenced 60 days before federal litigation is instituted; besides commencement no other obligation is placed upon the grievant." 441 U.S. at 759.

In *Oscar Mayer,* the complainant had not filed his complaint with the state agency prior to initiating action in federal court. This Court held that the federal action was premature because of the failure to file the state claim.

However, even though the statute of limitations under the state act had already passed, this Court also held that the claimant's mere act of filing with the state agency would then satisfy the federal requirements. The fact that the state agency would not have been empowered to grant any relief on that tardy claim was held to be irrelevant. In reaching this conclusion, the Court reasoned as follows:

> "[E]ven if a State were to make timeliness a precondition for commencement, rather than follow the more typical pattern of making untimeliness an affirmative defense, a state proceeding will be deemed commenced for purposes of sec. 14 (b) as soon as the complaint is filed." 441 U.S. at 760.

Thus, under the reasoning of *Oscar Mayer,* the fact that relief may not be available for an individual claimant in an individual case, or even that the state agency may lack jurisdiction over his claim, is not determinative. The state claim must first be filed if the state has a discrimination law and an agency empowered to enforce it. That state is a deferral state and hence a state in which the 300-day statute of limitations applies.

> "Individuals should not be penalized *if states decline for whatever reason* to take advantage of these opportunities." 441 U.S. at 761. (Emphasis added)

Therefore, the decision of the court below was in accord with these previously established principles.

B. The Deferral State Issue Is Primarily A Question Of State Law.

The court also, however, based its conclusion that Wisconsin was a deferral state upon its interpretation of the state of Wisconsin law at the time the charges involved were filed. In reaching that conclusion, the court noted that:

> "The exclusion of law enforcement officers from Wisconsin's age discrimination law, even as the law read at the time of the plaintiffs' termination, was not entirely free from ambiguity; a state court might have decided that only hazardous law enforcement jobs were intended to be excluded and might have gone on to find that these plaintiffs' jobs were not hazardous." (Pet. App. 8)

Certainly, the individual respondents, as laymen, cannot be presumed to have known, with any degree of certainty, that Wisconsin was not a deferral state. And, as the Supreme Court noted in *Mohasco Corporation v. Silver*, 447 U.S. 807 (1980):

> "[W]e do not believe that a court should read in a time limitation provision that Congress has not seen fit to include, . . . at least when dealing with 'a statutory scheme in which laymen, unassisted by trained lawyers initiate the process.' *Love v. Pullman Company*, 440 U.S. 552, 527, 30 L. Ed. 2d 679, 92 S. Ct. 616." 447 U.S. at 817, n. 4(b).

The circuit court concluded that the state law was not sufficiently clear so as to have completely foreclosed the possibility that there was some relief for these respondents under that state law. Since that decision necessarily

involves an interpretation of state law, and interpretations of state law fall outside the criteria applied in deciding to accept review as set forth in Rule 17, review by this Court would be inappropriate for that reason as well.

III. THE RESPONDENTS' CLAIMS ARE NOT BARRED BY THE 2-YEAR STATUTE OF LIMITATIONS.

The court below held that the two-year statute of limitations does not apply because it was not properly raised and maintained as a defense, and hence was waived.

The statute of limitations provision of the Portal-to-Portal Pay Act, 29 U.S.C. § 255, is an affirmative defense which must be pled in accordance with Fed. R. Civ. P. 8 (c). *Hodgson v. Humphries,* 454 F.2d 1279 (10th Cir. 1972) and *Mumbower v. Callicott,* 526 F.2d 1183, 1187 n. 5 (8th Cir. 1975). In *Hodgson,* the Court stated as follows:

> "We think it clear that section 6 was intended as a limitation on the remedy available, not on the right to bring the action, and must be pleaded as an affirmative defense in accordance with the requirements of Fed. R. Civ. P. 8 (c)." 454 F. 2d at 1284.

The Age Discrimination in Employment Act incorporates these statute of limitations provisions of the Portal-to-Portal Pay Act. 29 U.S.C.A. § 626 (e). The statute of limitations is thus waived if it is not raised in a pleading at the trial level. *Wagner v. Fawcett Publications,* 307 F.2d 409 (7th Cir. 1962).

In this situation, the petitioner did mention the bare words "statute of limitations" in its Answer. However, as the litigation progressed, it became clear that the statute of limitations to which petitioner referred was the limitation period for filing a charge with the EEOC. The

County made no mention of the two-year statute of limitations in its pretrial brief, or in its proposed findings of fact or conclusions of law. All of its argument was directed towards the alleged 180-day charge and filing requirement. It is clear that the statute of limitations pled by the County was the 180-day statute, not the two-year statute.

Even where a matter is adequately pleaded, it may be abandoned where no proof is given to support the allegation or where no action is taken on the allegation. *Deniccolo v. Paulmer,* 38 F. Supp. 874, aff'd 125 F.2d 127 (2d Cir. 1942). In this situation, no reference whatsoever was made to the two-year statute after the initial pleading of a "statute of limitations." The court below thus properly concluded that it had been abandoned and precluded the petitioner from raising this issue for the first time on appeal.

Petitioner acknowledges, at page 15 of its petition, that it did not "press" the two-year statute until its appeal. Petitioner also acknowledges in its petition that the decision to permit or not permit a party to raise a defense previously abandoned is within the discretion of the circuit court. The fact that another circuit court, on a different set of facts, exercised its discretion in a different way does not create a conflict among the circuit courts on the underlying legal rule, i.e., that the matter is discretionary. Indeed, this Court also declines to review issues not adequately presented below. See, *Ellis v. Dixon,* 349 U.S. 45, reh. denied, 350 U.S. 855 (1955).

Thus, the court below did not abuse its discretion by refusing to hear an issue not pursued below so as to call for an exercise of this Court's supervisory power.

CONCLUSION

For the above reasons, the respondents respectfully submit that the petition for a writ of certiorari should be denied.

Dated this 11th day of January, 1985.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Case # 82-C-273

WESLEY N. HEIAR, et al.,

Plaintiffs,

v.

CRAWFORD COUNTY, WI., et al.,

Defendants.

JOINT PRE-TRIAL REPORT

Date of Pre-Trial Conference: March 24, 1983

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Counsel for Defendants

UNCONTESTED MATERIAL FACTS

* * * *

9. Plaintiff Heiar was born September 15, 1922. Answer to Amended Complaint, para. 24.

10. Plaintiff Strauman was born May 24, 1924. Answer to Amended Complaint, para. 25.

11. Plaintiff Brown was born September 9, 1924. Answer to Amended Complaint, para. 26.

12. Plaintiffs were retired from their employments pursuant to the retirement policy established by the County. Answer to Amended Complaint, para. 28(b).

* * * *

14. Crawford County adopted a resolution on April 17, 1979, a part of which reads as follows:

> "Now, therefore, be it resolved, that it is the policy of Crawford County, Wisconsin that all non-elective protective occupation participants in the employ of said county cease employment for said county on the day on which said protective occupation participants of the Wisconsin Republic [sic] Employees Retirement Fund reaches the age of fifty-five (55) years."

Answer to Amended Complaint, para. 34.

* * * *

18. Plaintiff Heiar was employed as a full time deputy sheriff of Crawford County from November, 1970 until June 30, 1979.

* * * *

21. Plaintiff Strauman was employed by Crawford County as a full-time deputy sheriff continuously from 1962 to June 30, 1979.

* * * *

23. Plaintiff Brown was employed by Crawford County as a full-time deputy sheriff from 1969 until September 9, 1979.

* * * *

26. Plaintiffs at all times, up to and including their mandatory retirements, satisfactorily performed their duties as deputy sheriffs.

• • • •

28. At the time of Plaintiffs' involuntary retirements Crawford County did not have an annual medical check up, physical fitness requirement or an ongoing physical fitness program for any of the deputized employees of the Sheriff's Department.

29. Crawford County did not in 1979 or prior thereto, and does not now, require incumbent deputy sheriffs to pass a regular fitness test or medical examination in order to retain their jobs.

30. Prior to the decision to compel Sergeant Strauman, Sergeant Brown and Patrolman Heiar to retire, Defendants did not review Plaintiffs' personnel files or request a medical opinion to determine if they were fit for their jobs.

• • • •

32. Prior to the retirement of Heiar and Strauman, no employee of the Crawford County Sheriff's Department had ever been involuntarily retired because of age.

• • • •

35. None of the Plaintiffs are receiving full retirement benefits (defined as 50% of final rate of earnings) under the Wisconsin Retirement Fund.

• • • •

37. In December, 1979, all three plaintiffs filed charges with the State Agency, the Department of Labor,

Industry & Human Relations, Equal Rights Division. The charge alleged that they had been compelled to retire at age 55.

38. The Equal Rights Division responded as follows:

"We are unable to investigate your claim of discrimination against the Crawford County Sheriff's Department because Wisconsin's Fair Employment Law does not coverage discrimination against any hazardous type occupation such as law enforcement or fire fighting." (Exh. 35)

* * * *

44. Subsequent to the filing of Plaintiffs' charges conciliation was undertaken by EEOC.

45. The results of EEOC's attempted conciliation were unsuccessful. On March 18, 1982, all Plaintiffs were notified by letter . . . .

46. Plaintiffs commenced this action by Complaint filed April 16, 1982.

* * * *

51. Individuals with less than 20 years of service under WRF who are forced to retire early cannot qualify for any military service credit under Wis. Stat. §41.09 (3)(c).

* * * *

(R. 46, pp. 1-9)

———o———

TESTIMONY OF KENNETH STRAUMAN
DIRECT EXAMINATION BY MR. HESSLINK:

Q. Could you spell your name and give your address for the record please?

A. First name Kenneth, I. Strauman, S-t-r-a-u-m-a-n, 1021 South Sixth Street, Prairie du Chien, Wisconsin, Crawford County.

* * * *

Q. Did you ever have occasion to draw a weapon of any type during the course of your duties at the sheriff's department?

A. The only weapon that I have ever drawn was at a roadblock for escapees, jail break, and that was a sawed-off shotgun.

Q. Did you ever have an occasion to discharge a weapon in the line of duty other than training at the Crawford County sheriff's department?

A. No.

Q. What is the most stressful situation that you recall in your tenure at the Crawford County sheriff's department?

A. High-speed chases.

Q. What was stressful about high-speed chases?

A. At the time you had to watch for traffic and animals on the highway.

Q. Did the nature of high-speed chases change over time as you were employed at the sheriff's department?

A. Yes. The squad cars go slower.

Q. Were there any changes in policy regarding high-speed chases?

A. Yes.

Q. What was that change in policy?

A. Ten miles over the speed limit. (R. 85, pp. 3-14)

———o———

TESTIMONY OF WILLIAM BANTA
DIRECT EXAMINATION BY MR. UELMEN:

Q. Would you state your name for the record, please.

A. William Banta.

Q. By whom are you employed?

A. I'm retired.

Q. By whom were you employed before you retired your recent position?

A. With the U.S. Marshal's Service here in Madison, Wisconsin.

* * * *

Q. How long were you employed by the U.S. Marshal's Service?

A. Twenty-three-plus years.

Q. And what positions did you hold with that service during your employment?

A. As a deputy, a chief deputy, U.S. Marshal; and I retired as a Chief Deputy.

* * * *

CROSS-EXAMINATION BY MR. HESSLINK:

* * * *

Q. Do U.S. Marshals engage in routine traffic patrol?

A. No.

* * * *

Q. How about running a police radio? In your view would that be more or less stressful than being responsible for the security of a federal prisoner?

A. I think that would be less stressful, because you are not out on the street facing all these unknowns.

Q. You aren't meaning to say, are you, that the duties of a deputy sheriff in Crawford County are identical in

terms of what they do on a daily basis to what you, a U.S. Marshal, does?

A. No, because we're not involved with the highway patrol and the house calls on family feuds, so to speak. But I am saying basically as a rule, you know, that we are officers of the court, like the sheriff I'm sure is an officer of his court. We take care of all the court's demands hopefully. (R. 86, pp. 311-321)

———o———

TESTIMONY OF EUGENE E. BABLER
DIRECT EXAMINATION BY MR. UELMEN:

Q. Would you state your name for the record, please.

A. I guess my official name would be Eugene E. Babler, B-a-b-l-e-r.

* * * *

Q. By whom were you employed prior to your employment with the District Attorney?

A. With the FBI as a Special Agent.

Q. How long did you work for the Federal Bureau of Investigation?

A. Approximately twenty-nine and a half years.

* * * *

CROSS-EXAMINATION BY MR. HESSLINK:

* * * *

Q. You don't mean to testify an FBI agent does on a daily basis what a local law enforcement official does?

A. No. Minute by minute, no but they are comparable.

Q. There are also substantial differences, are there not?

A. I would say there are some differences.

Q. For example, as an FBI agent you normally don't engage in local traffic patrol?

A. That is correct.

Q. You don't function as dispatcher on a radio?

A. No. That would be a clerical function. (R. 86, pp. 359-386)

———o———

TESTIMONY OF WILLIAM C. FILLBACH
DIRECT EXAMINATION BY MR. UELMEN:

Q. Would you state your full name for the record, please.

A. William C. Fillbach, F-i-l-l-b-a-c-h.

Q. By whom are you employed?

A. Crawford County Sheriff's Department.

Q. And what position do you hold with the Sheriff's Department?

A. Sheriff of Crawford County.

Q. How long have you been the Sheriff of Crawford County?

A. This is my fifth term. That would be nine years.

Q. Did you work for the Sheriff's Department prior to the time that you became sheriff?

A. Yes, sir, I did.

Q. What year did you start working with the Sheriff's Department?

A. Approximately 1968.

Q. What position did you hold in 1968?

A. Traffic officer.

• • • •

Q. Does your department have any responsibility with respect to automobile accidents?

A. Yes, we do investigate all or most of the accidents. We have approximately between 400 and 500 accidents in Crawford County. The State Patrol probably takes care of about 20, 25 of those maybe.

• • • •

Q. Would you tell the Court what in your opinion is the most stressful part of the work of being a deputy sheriff in Crawford County?

A. Oh, I think there's many things that are stressful. I know the problem is that you put a lot of mileage on a car in an eight-hour shift if you go all over Crawford County, and you got to be on your toes all the time if you're stopping cars or driving. Like I said earlier, the terrain of the curves and the hills.

Another problem is that when you get the call to go to a house fight or a bar fight or an accident, you never know what's going to be there. You always want to expect the worse.

• • • •

CROSS-EXAMINATION BY MR. HESSLINK:

Q. Sheriff Fillbach, is it fair to say that the Crawford County Sheriff's Department has never had any kind of a physical fitness program?

A. Yes, sir, that is correct.

Q. Is it also fair to say that the Crawford County Sheriff's Department has never used any kind of physical tests as a condition of continued employment in the Sheriff's Department?

A. Yes, sir, that is correct.

Q. Would it also be fair to say that prior to the retirement or the retirement of the three plaintiffs, that Crawford County never considered physical fitness to be a major requirement of the job of deputy sheriff?

A. Yes, sir, that is correct.

Q. At what point in time did Crawford County consider physical fitness to be a major requirement of the job of deputy sheriff?

A. I don't know if they ever have.

Q. Who is an individual named Joe Schultz?

A. Joe Schultz was a radio operator-jailer when I came with the Sheriff's Department in 1968.

Q. How long did he remain as a radio operator-jailer at the Sheriff's department?

• • • •

A. '75.

Q. '75. Mr. Schultz had one leg?

A. Yes, sir, that is correct.

• • • •

Q. But he never had any difficulty in completing his duties or responsibilities that you were aware of?

A. No, sir.

Q. Do you recall, were you present during the testimony of Dr. Grossman when he indicated that one of the risk factors for cardiovascular disease was diabetes?

A. Yes, sir, I was.

Q. Do you presently have any officers on the police department in Crawford County who you know of to have diabetes?

A. Yes, sir. We have one.

Q. Were you present during the testimony of Dr. Foss when he indicated that one of the factors which would inhibit a police officer's ability to perform his duty is obesity?

A. What's that mean? I'm sorry, but I—

Q. Being too fat in weight.

A. Yes, sir.

Q. Are you familiar with Mr. Lund?

A. Yes, sir, very well.

Q. Can you tell me about how much Roger Lund weighs?

A. I never did find out. But over 300 pounds.

Q. Do you fell that Roger Lund is capable of performing the duties and responsibilities of chief deputy in the Sheriff's Department?

A. He has the last nine or ten years.

• • • •

Q. Now, I believe on your direct testimony that you said there was a robbery a few years ago in Crawford County.

A. Yes, there was.

Q. How long ago was that?

A. I'd have to say probably 1976-77.

Q. And I think you said about the time you started there was a murder in Crawford County. Was that when you started fifteen years ago as a deputy or nine years ago as a sheriff?

A. Nine years as a sheriff.

• • • •

Q. Have you ever had occasion to draw it [firearm] and point it at another human being?

A. Never pulled it to and pointed it at another human being, but I did have the strap off several occasions in case I had to use it in the situations that I was in. (R. 82, pp. 323-349)

1979

CRAWFORD COUNTY SHERIFF'S DEPARTMENT

Sheriff

William C. Fillbach

Chief Deputy

Roger C. Lund

Investigator and Traffic Officer

Robert Ostrander

Traffic Officers

Sgt. Kenneth Strauman
Frederick Brockway
Wesley Heiar
Terrence Zinkle

Radio Operators/Jailers

Sgt. Myrl Brown
Patrick May
Gary Sprosty
Mary Nash
Gary George

Secretary

Ruth Jackley

Janitor

George Ingle

/s/ William C. Fillbach
Sheriff

12/28/82
(Exhibit 16)

(3)

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No. 84-948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CRAWFORD COUNTY WISCONSIN,
Petitioner,

vs.

WESLEY N. HEIAR, KENNETH I. STRAUMAN and MYRL E. BROWN,
Respondents.

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPLEMENTAL APPENDIX

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No. 84-948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CRAWFORD COUNTY WISCONSIN,
Petitioner,

vs.

WESLEY N. HEIAR, KENNETH I. STRAUMAN and MYRL E. BROWN,
Respondents.

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPLEMENTAL APPENDIX

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to U.S. Supreme Court Rule 22.5, Petitioner submits the following arguments in reply to Respondents' Brief in Opposition to the Petition for a Writ of Certiorari in the above captioned case.

I. REASONS FOR GRANTING THE WRIT.

1. There Is A Direct Conflict Between The Decisions Of The United States Circuit Courts of Appeal On The First Issue Raised In The Petition For Writ of Certiorari.

Several United States Circuit Courts of Appeal have held that an age less than 70 is a bona fide occupational qualification (BFOQ) for law enforcement and firefighting personnel.[1] The Courts of Appeal for the Fourth and Eighth Circuits have relied on the Congressional determination embodied in 5 U.S.C. § 8335(b), in reaching the conclusion that age is a BFOQ for law enforcement and firefighting personnel. See *Johnson v. Mayor and City of Baltimore, supra; EEOC v. Missouri State Highway Patrol, supra.* In fact, the court in *Johnson* specifically held that the City was entitled to the BFOQ defense, as a matter of law, because of congress' adoption under 5 U.S.C. § 8335(b) of the identical retirement age for federal firefighters. 731 F.2d at 212-13. The decision of the court below, notwithstanding specific acknowledgment of the *Johnson* opinion, held to the contrary on this very issue. (See Petition App. 14-15).

This Court has agreed to resolve the conflict between the circuit courts on this significant issue by accepting the Petition for a Writ of Certiorari in *Johnson* on the following question:

> Does federal civil service retirement statute, 5 U.S.C. § 8335(b), which authorizes involuntary retirement of federal firefighters at age 55, establish as a matter of law

---

[1] *Johnson v. Mayor & City of Baltimore,* 731 F.2d 209 (4th Cir. 1984), *cert. granted,* 53 U.S.L.W. 3496 (U.S. Jan. 15, 1985) (No. 84-518 and 84-710); *EEOC v. Missouri State Highway Patrol,* ____ F.2d ____, 36 F.E.P. Cases 401 (8th Cir. Nov. 12, 1984); see also *Mahoney v. Trabucco,* 738 F.2d 35 (1st Cir. 1984), *cert. denied,* 53 U.S.L.W. 3403 (U.S. Nov. 26, 1984) (No. 84-513) (holding that age 50 is a BFOQ for state police officers).

that age 55 is a bona fide occupational qualification under ADEA for non-federal firefighters nationwide?

53 U.S.L.W. 3496 (U.S. Jan. 15, 1985) (No. 84-518). This is the precise issue raised by the petition at bar. Respondents' attempts to distinguish this case from *Johnson* are insufficient to render "academic" the conflict in the holdings between the Fourth and Seventh Circuits on the issue of the relevance of 5 U.S.C. § 8335(b) to the ADEA.

For the purpose of proving the applicability of 5 U.S.C. § 8335(b), Crawford County introduced at trial substantial evidence to show that the County's law enforcement officers performed work similar to that performed by law enforcement officers employed by the federal government which has selected age 55 as its mandatory retirement age.[2] The trial court made findings consistent with the position that the work performed by state and federal law enforcement personnel is similar. (See Petition App. 36-37). Moreover, contrary to the implied argument of respondent, the court below did not base its denial of the applicability of 5 U.S.C. § 8335(b) on a rejection of the trial court's findings that the requisite duties of state and federal law enforcement personnel are similar.

The respondent also argues, as a basis for distinguishing *Johnson,* that 5 U.S.C. § 8335(b) does not apply to the County's law enforcement officers because certain exceptions to the retirement of federal law enforcement personnel would be available to the County employees thus making their retirement

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[2] Many duties performed by employees working for state governments are identical to those of federal employees. For example, prison guards in state prisons perform much the same work as prison guards in federal prisons. 5 U.S.C. § 8335(b) has been sustained as having a "rational basis in fact" when applied in the context of the retirement of federal employees. *See Bowman v. U.S. Department of Justice,* 510 F.Supp. 1183 (E.D. Va. 1981), *aff'd,* 679 F.2d 876 (4th Cir.), *cert. denied,* 459 U.S. 1072 (1982).

at 55 voluntary, not mandatory (Resp. Brief, p. 14). This argument, however, fails to erase the conflict between *Johnson* and the court below on the applicability of 5 U.S.C. § 8335(b) to the ADEA.

The court in *Johnson* held, based on the reasonable federal standard set out under 5 U.S.C. § 8335(b), that age was a BFOQ for comparably situated non-federal employees *notwithstanding the very argument raised by the respondents. See Johnson,* 731 F.2d at 213 n. 12; *see also* 731 F.2d at 217-18 (Winter, C.J., dissenting). In direct contrast to *Johnson,* the court below rejected the applicability of 5 U.S.C. § 8335(b) *based on the very argument raised by the respondents* (see Petition App. 14-15).[3]

2. There Is A Conflict Between The Circuits On The Standards To Be Applied In Determining The Burden Of Proof Necessary To Establish Age As A Bona Fide Occupational Qualification For Employees Working In Jobs That Affect Public Safety.

Contrary to the respondents' position, the decision of the court below is not in accord with prior holdings of this Court or other federal court holdings. A survey of prior federal precedent reveals that there has not been uniform application of the criteria necessary for determining the existence of a BFOQ defense. (See Petition p. 10-13). While many courts have adopted the criteria set forth in the EEOC guidelines, 29 C.F.R. § 1625.6, as a basis for evaluating the BFOQ defense, the application of the guidelines (the sufficiency of evidence necessary to meet the EEOC guidelines) has been far from consistent.

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[3] The Petitioner also notes that the applicable state statute, like its federal counterpart, also provided exceptions to mandatory retirement of law enforcement employees. See Wis. Stat. 41.11(1) (Petition App. 86). As construed by the court below, the federal law preserves the right of the employer to grant or deny extensions for federal employees but *sub silentio* prohibits the state from exercising this discretion for the same job classifications.

Petitioner submits that Congress did not intend to permit trial courts and juries to decide, on a case by case basis dependent upon separate evidentiary showings, the issue of whether a municipality is permitted or prohibited from retiring its law enforcement officers at age 55. While such an allowance *may* be workable in classifications of employment where the continuation of an employee affects only profits or productivity, this cannot be the rule in jobs where public safety considerations are paramount.

Indeed, the decisions in most circuits have apparently recognized the importance of uniformity in the application of a BFOQ for a mandatory hiring age limit in occupations affecting public safety.[4] Such uniformity is of equal or greater importance in mandatory retirement cases. A recent decision of the United States District Court for the Eastern District of Wisconsin rejected age 55 as a bona fide occupational qualification for deputy sheriffs holding that it would be "disastrous" to permit compulsory retirement of deputy sheriffs in one County of Wisconsin at age 55 while prohibiting it in another. *Kossman, et al v. Calumet County*, Civil Action No. 81-C-419, 83-C-1669, 84-C-879 (E.D. Wis. 1985). (Supp. App. 5). The trial court's point as to the need for intra-state consistency is clearly correct. Public safety considerations and the special protections and benefits which are incorporated in the state statutes for these classifications of employees require uniform handling. This Court should grant Writ in this case to insure the consistency which is required.

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[4] Limiting to 40 years the hiring age in occupations affecting public safety seems to be achieving universal acceptance. *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

3. Contrary To The Respondents' Assertions, The Statutes Of Limitations Issues Should Be Resolved By This Court.

A. The 180-Day Statute.

The respondent asserts that the Wisconsin statutes are too confusing for the ordinary reader to make a determination as to whether Wisconsin is a "deferral state". (Resp. Brief, p. 19). Indeed, the decision of the Court of Appeals reflects this position. In its opinion the court below stated:

> *** a state court might have decided that only hazardous law enforcement jobs were intended to be excluded and might have gone on to find that these plaintiffs' jobs were not hazardous.

(Pet. App. 8).

The Petitioner submits, however, that the statute is not subject to the equivocation found by the court below and the respondent. The plain and unambiguous statutory language at issue provides:

> The prohibition against discrimination because of age shall not apply to hazardous occupations including, without limitation because of enumeration, law enforcement or firefighting.

Wis Stats. § 111.32(e). (Petition App. 86).

It strains credulity to assert that the law enforcement officers in Wisconsin (who were the main lobby force for the establishment of age 55 as the mandatory retirement age) did not know that the statutory prohibitions against age discrimination, by express terms, exempted those job classifications from coverage. Indeed, "deputy sheriffs" are specifically mentioned in § 41.02(11)(a) Stats., the statutory definition of "protective occupation participant". (Petition App. 85).

Because the age discrimination statute expressly excluded this classification from coverage, thereby precluding state agencies from affording relief, Wisconsin was by definition not a "deferral state". 29 U.S.C. §§ 626(d)(2) and 633(b). Because relief was not available under state law, the charge had to be filed within 180 days of the unfavorable employment decision.

B. The Two-Year Statute.

Contrary to the respondents' argument, Petitioner submits that it was an abuse of discretion for the court below to deny this statute of limitations defense under the facts of this case.

Although the plaintiffs consulted counsel immediately after their retirement in June 1979, a complaint was not filed until a few days before the three-year statute of limitations was to expire apparently due to their strong conviction that the alleged violation was "willful". However, the trial court found that the violation was not willful and this finding was affirmed by the court below. Nevertheless, despite affirming the finding that the violation was not willful and determining that the defense of the statute of limitations had been generally raised in the County's answer, the court refused to apply the two-year statute of limitations and to dismiss the complaint as a matter of law.

No justifiable reason was given by the court below for striking the defense in its entirety other than the assertion that it was not "pressed" in the trial court.[5] However, it was the findings of the trial court that made this specific legal defense viable in the first place. Therefore, under these unusual circumstances, the County should have been permitted, even required, to raise the defense in the court of appeals.

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[5] The court of appeals agreed that the two-year statute of limitations was applicable but speculated that respondent might have "presented evidence in the district court to show that the defendants had tolled it ***." (Petition App. 11). However, no facts which would justify tolling were asserted anywhere in the briefs filed in the court below nor were any asserted in respondent's brief in this Court. If such facts exist, and the petitioner asserts they do not, the court below should have

It seems clear from the decided cases that the courts of appeal have permitted parties the opportunity of raising statute of limitations and other legal defenses for the first time on appeal (Petition pp. 16-17). To totally deprive petitioner of that defense, a defense the court below found meritorious, constituted, in these circumstances, an abuse of its discretion.

CONCLUSION

For the reasons stated above and set out in the Petition for a Writ of Certiorari, it is respectfully submitted that the Court grant the writ of certiorari in this case.

Respectfully submitted,

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included that issue in its remand order. See *Adato v. Kagan*, 599 F.2d 1111, 1116 (2d Cir. 1979). Instead of doing so the court deprived the petitioner of the defense in its entirety.

SUPPLEMENTAL APPENDIX

Kossman, et al., v. Calumet County, Civil Action No. 81-C-419, 83-C-1669, 84-C-879 (E.D. Wis. 1985).

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 81-C-419

Donald J. Kossman,
Plaintiff,

v.

Calumet County,
Defendant.

Civil Action No. 83-C-1669

Warran Jodar,
Plaintiff,

v.

Calumet County,
Defendant.

Civil Action No. 84-C-879

Rodney Ott,
Plaintiff,

v.

Calumet County,
Defendant.

DECISION and ORDER

(Filed Jan. 9, 1985)

These three consolidated cases were tried to the court in December of 1984 and January of 1985. The plaintiffs are three former Deputy Sheriffs (one, however, has been reinstated) from Calumet County, Wisconsin. All have brought suit against the County, charging that its mandatory retirement age

of 55 for deputy sheriffs violates the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* Although I have a great deal of sympathy for the County in these cases as it tries to make some sense out of what is an almost impossible maze and mismatch of judicial opinions and legislative determinations, I find for the plaintiffs and direct that judgment be entered in favor of each of them as provided herein.

Donald Kossman was born June 28, 1925. He started working as a Deputy Sheriff in Calumet County in 1957. Shortly after reaching age 55, on December 31, 1980, he was terminated pursuant to the County's "mandatory retirement policy." At the time of his termination, Kossman held the position of Sergeant-Investigator with the department.

Warran Jodar was born on September 21, 1926. He was hired by the County in 1958, and was terminated pursuant to the policy on October 1, 1981.

Rodney Ott was born on April 6, 1927, and was hired by the County in 1963. Ott was terminated pursuant to the policy on June 30, 1982. Without prejudice to the rights of the county to claim that its actions were proper in this case, it reinstated Ott as a Deputy Sheriff on March 26, 1984. At the time of his termination in 1982, Ott held the position of Sergeant-Traffic Officer, the same position that had been held by Jodar.

Calumet is a small mideastern county in Wisconsin. Its 1970 population was 27,604. In 1980, its population was 30,867. Depite its relatively small size, it is, of course, subject to the provisions of the age discrimination law. *EEOC v. Wyoming,* 460 U.S. 226 (1983).

The Act prohibits discrimination on the basis of age against all persons within the protected age group, now ages 40 through 70. The issue in this case is whether Calumet County's mandatory retirement age policy falls within the Act's exception for cases "where age is a bona fide occupational qualification

reasonably necessary to the normal operation of the particular business . . .." 29 U.S.C. § 623(f)1). The county, has the burden of proving the bona fide occupational qualification (BFOQ) defense that it raises in this case. I find that the credible evidence in this case falls far short of that necessary to carry the burden. Having listened to and observed the plaintiffs, I am convinced that they are fully able to discharge the duties of a Calumet County deputy sheriff despite their respective ages. Accordingly, I reject the defense and find in favor of the plaintiffs.

In *Orzei v. City of Wauwatosa Fire Dep't,* 697 F.2d 743 (7th Cir. 1983),—a case that involved the application of a mandatory retirement age of 55 to an assistant fire chief—the Court of Appeals for this Circuit held that it was not enough for an employer "to show that it made a good faith judgment concerning the safety needs of its citizens" when it enacted the mandatory retirement policy. The Court in *Orzei* rejected the argument that the employer's "mandatory retirement policy should be upheld as long as that policy is 'not the result of an arbitrary belief lacking in objective reason or rationale' . . .." If a good faith judgment, based simply on some loose correlation between the needs of the job and the effects of age were enough to bring a mandatory retirement policy within the BFOQ exception the Act would have, as the Court noted, little effect. More is required of a defendant seeking the protection of a BFOQ defense.

Obviously, some of the duties of a Calumet County Deputy Sheriff require quick, strenuous, and sometimes vigorous physical activity, and sometimes the conditions of employment are hazardous. Certainly also, one's ability to respond diminishes with age. In this case, the county has done little more than attempt to establish some inverse correlation between age and job fitness. It has not done so, and even if it did it would not be enough to carry its burden.

Many of the duties performed by a Calumet County Deputy Sheriff, a police officer in a small, rural, and sparsely populated

county, are not particularly dangerous. There is nothing in the record that convinces me to the degree of proof required, that one's ability to perform the tasks of a Calumet County Deputy Sheriff are diminished to such an extent at age 55 that it is "reasonably necessary" to the normal operation of the Sheriff's Department that the officer be relieved of his duties.

In a similar case tried in the Western District of Wisconsin, Judge Shabaz found that three Deputy Sheriffs employed by Crawford County were entitled to reinstatement, as their discharge by the county violated the Age Discrimination In Employment Act. Judge Shabaz rejected the defense of Crawford County that its action was justified as a BFOQ. Against the "not clearly erroneous" standard, the Court of Appeals for this Circuit affirmed Judge Shabaz in *Heiar v. Crawford County, Wisconsin,* ____ F.2d ____ (7th Cir. 1984).

Crawford County, which lies in the southwestern corner of Wisconsin, had a 1980 population of 16,556. It is hard to believe that the duties of a deputy vary significantly in Crawford and Calumet Counties. Also, if the law in this area is to have any redeeming value, it must afford some reasonable certainty to those trying to avoid violating it. In my judgment, it would be disastrous to find that deputy sheriffs could be retired involuntarily at 55 in Calumet County but not in Crawford County. Also, what would the policy be in the other 70 counties in Wisconsin? Inconsistent results in interpreting this area of the law would not serve the public interest.

In addition to a finding of liability in this case, the plaintiffs urge that I find the actions of the county to be "wilful" under the Act. A finding of "wilfulness" entitles the plaintiffs to liquidated, or double, damages. Considering the murky area of the law in which the issue in this case is raised and the obvious unfairness inherent in the decision of Congress to exempt federal personnel in the law enforcement area from the requirements of the Act, a finding of wilfulness in this case is out of the question. See the dissent of Judge Gibson in *Heiar v. Crawford County, supra.*

In conclusion, I find that the action of the defendant in retiring Kossman, Jodar and Ott violated the Age Discrimination in Employment Act. All are entitled to an award of back pay set off against the pension payments, unemployment compensation, and other income that they received during the period following their termination. Also, I find that each plaintiff should receive an award of interest to make them whole. Because substantial stipulations have been reached in these cases insofar as the damage figures are concerned, I will give the parties an opportunity to negotiate further and present to the court a stipulated bottom line damage plus interest award for each plaintiff. Hopefully, an agreement can be reached as to each and a judgment entered accordingly. If the parties are unable to agree on the amount of damages plus interest, they must file their respective positions with me on or before February 5, 1985, and appear at a hearing to argue the point on February 11, 1985, at 1:30 p.m. In addition, as prevailing parties, each plaintiff is entitled to an award of attorney's fees. Like the damage figures, the parties should attempt to reach an agreement on the sum and failing that, they should follow the same procedure outlined above in resolving the general damage question in this case.

Simply for guidance on the attorneys' fees issue, I think it appropriate to note that I believe this case, at least certainly the trial aspect of it, was not too well focused. It took 4 days of trial to put in the evidence, twice the time I was told it would take when the case was pretrialed. Some of the trial time was wasted on matters of general irrelevancy. The issue in this case, if properly focused, should have been presented in no more than the two days originally set as an estimate. This observation may warrant consideration by counsel on the issue of attorney's fees.

SO ORDERED at Milwaukee, Wisconsin, this 9 day of January, 1985.

BY THE COURT:

TERENCE T. EVANS
United States District Judge